COMPETITION

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INSIDE THIS ISSUE

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COMPETITION

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ANTITRUST AND CONSUMER PROTECTION SECTION EXECUTIVE COMMITTEE 2025-2026

CHAIR'S COLUMN

Shira Liu, Immediate Past Chair
BRS LLP
Los Angeles, CA

The Section is proud to present the Fall 2025 edition of Competition which contains works of scholarship on topics running the gamut of antitrust and unfair competition law. This phenomenal publication would not be possible without the extraordinary work of our authors, editors, support staff, and other contributors. I wish to extend my sincere appreciation to them all.

The Section's programming highlights the best in our practice. We held our Seventh Annual Celebrating Women in Competition in California last March, bringing together an extraordinary panel of attorneys from across the bar—plaintiff counsel, defense counsel, in-house attorneys, and government enforcers—to share their experiences and challenges in our practice. Our educational offerings have been tremendous as well. We've sponsored a variety of webinars and in-person panels covering antitrust economics, collusion through artificial intelligence, government enforcement priorities, and other topics. Our monthly E-Briefs, News and Notes has provided timely, substantive updates on key matters in our practice which has seen extraordinary developments through private litigation, public enforcement, and new state law initiatives over the past year. Once again, we've updated the Section's beloved treatise, the comprehensive guide to California competition law.

The Section placed renewed focus on our diversity and new lawyer initiatives this year. We doubled our commitment to expanding our practice to students from underrepresented groups, awarding our Inclusion & Diversity Fellowships to two aspiring law students who received summer internships in government agencies, a $10,000 stipend each, and mentorship throughout the year. The Section renewed our mentorship program to match lawyers in their first eight years of practice with seasoned veterans of the antitrust and consumer bar. We engaged law students throughout the State with programming and networking events dedicated to opening the bar to so many individuals who are looking for a professional home. And the Section awarded our Lawyers to Watch Award to an inaugural class of five attorneys in the first eight years of their legal careers who have exhibited outstanding achievements in the practice of antitrust and unfair competition law during the previous year.

I am proud of these accomplishments, as they represent the incredible work of our Section. None of this would be possible, however, without the tireless dedication of the members of our Section's Executive Committee, Advisors, and countless volunteers. I have been fortunate to observe their tremendous leadership day in and day out over the past year. I am humbled by their commitment and honored to have had the opportunity to serve as the Section's Chair.

As has long been said, there is more work to do, and our best days are ahead of us. As I pass the baton to our incoming Chair, Lee Brand, I am confident that the Section remains in capable hands and will continue to provide extraordinary benefits for our members.

Shira Liu
Los Angeles, California

Vol 35, No. 1 Fall 2025

The Journal of the Antitrust and Consumer Protection Section of the California Lawyers Association

TABLE OF CONTENTS

Articles Page

DEFAULTING TO THE STATUS QUO: THE GOOGLE SEARCH REMEDIES DECISION

By Samuel Miller and Ryan Sandrock[1]

The hardest part of a government-initiated Section 2 monopolization case is figuring out the appropriate remedy. In part, this is because the general pronouncements of the Supreme Court regarding remedies in monopolization cases are somewhat in conflict. On the one hand, antitrust relief should unfetter a market from anticompetitive conduct, "pry open a market that had been closed" by defendant's illegal conduct and deny to the defendant the fruits of its statutory violation.[2] On the other hand, the remedy should not be designed to punish the defendant, should be "tailored to fit the wrong" and should not undermine the incentives of the defendant or rivals to innovate.[3] Finding the right balance is especially difficult in cases, such as *Microsoft* and *Google*, where the defendant acquired monopoly power through innovation and "competition on the merits," but was found to have illegally *maintained* a monopoly by "exclusionary" means. And it is particularly difficult when the markets at issue change over the course of the case—so that a case about Search became a case about AI.

In the landmark decision of *United States v. Google LLC*, 747 F. Supp. 3d 1 (D.D. C. 2024), District Judge Amit Mehta found that Google had violated Section 2 of the Sherman Act by entering into actual or *de facto* exclusive dealing arrangements for default placement of Google search with browser developers such as Apple and Mozilla, wireless carriers such as Verizon and AT&T, and cellphone manufacturers such as Samsung and Motorola. The "wrong" committed by Google was to "lock up" the key channels of distribution for general search services to the exclusion of rivals such as Bing and DuckDuckGo, giving Google a massive scale advantage.[4]

This article will examine Judge Mehta's recent Remedy Opinion, issued on Sept. 2, 2025, *United States v Google LLC*, case 1: 20-cv-03010, Dkt. 1436 (hereinafter Google Remedy Opn.) and discuss whether Judge Mehta found the right balance. Judge Mehta's Liability and Remedy Opinions were heavily influenced by the decisions in the *Microsoft* case, including the historic D.C. Circuit *en banc* decision upholding Section 2 liability (but reversing the District Court's remedy determination that Microsoft should be broken up), *United States v Microsoft Corp.*, 253 F. 3d 34 (D.C. Cir. 2001), as well as the subsequent decision approving the consent judgment agreed to by the Antitrust Division and some

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1 Samuel Miller was the lead prosecutor for the United States in the licensing case against Microsoft. Ryan Sandrock worked on the early stages of the Google Search case during his time at the Antitrust Division. Sam and Ryan together teach Antitrust and Intellectual Property at the University of California College of the Law—San Francisco. The views expressed in this article are solely those of the authors.

2 See *Ford Motor Co. v United States*, 405 U.S. 562,573 (1972); *United States v. Microsoft Corp.*, 253 F. 3d 34,103 (D.C. Cir. 2001) (en banc) (hereinafter *Microsoft*).

3 Microsoft, 253 F. 3d at 107.

4 *United States v. Google LLC*, 747 F. Supp. 3d 1, 159-163 (D.D.C. 2024) (hereinafter Google Liability Opn.); *United States v. Google LLC*, case 1:20-cv-03010, Dkt. 1436 at p. 149-150, 2025 U.S. Dist. LEXIS 170459 (D.D. C. Sept. 2, 2025) (hereinafter Google Remedy Opn.) (page citations in this article will be to the Slip Opinion).

states with Microsoft, *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002) (hereinafter "*New York*") and the decision rejecting more severe remedies urged by other states, including California and Massachusetts, *Massachusetts v. Microsoft Corp.*, 373 F. 3d 1119 (D. C. Cir. 2004) (hereinafter "*Massachusetts*").

Although Judge Mehta recognized that the general search market had been "frozen" for over 10 years, he noted that the recent emergence of generative AI ("GenAI) and chatbots had created a new and potentially serious competitive threat to Google's dominance. Judge Mehta found that the GenAI space is "highly competitive", with new entrants and access to billions of dollars of capital.[5] This clearly influenced his thinking as to which proposed remedies to accept and which to reject.

Judge Mehta appears to have faith that there will be an AI revolution that will disrupt current technologies and allow market forces to determine the next generation of winners and losers. Already, however, there are loud skeptics. As described in more detail below, the most jarring element of the opinion for many is that Google will still be allowed to pay for defaults. The liability decision concluded that those payments harmed competition and gave Google an unfair advantage, but the remedies decision seems to conclude that barring those payments could harm competition even more. Critics also are upset about the lack of any structural remedies, although a break-up was always more unlikely than a ban on defaults.

NO EXCLUSIVE DEALING AND LIMITING LICENSES TO A ONE YEAR TERM

As a starting point, the District Court ordered that Google should be prohibited from entering into exclusive licensing arrangements with browser developers, cellphone manufacturers, or wireless carriers, or agreements which conditioned the licensing of Google Play Store or other Google software on that entity's distributing or preloading Google Search or Chrome.[6] Interestingly, the District Court also limited the term of Google licensing agreements to one year. This limitation harkens back to the original Antitrust Division case against Microsoft in the mid-1990's, in which the Consent Decree limited the term of Microsoft's operating system licensing agreements to one year, in order to give rival operating system developers an opportunity to seek business from PC manufacturers[7].

However, Judge Mehta rejected Google's argument that prohibiting exclusive arrangements is all that the Court could or should do, stating:

> Merely excising the exclusive provisions from Google's distribution agreements will not unleash competition. Google's remedies fail to address any illegally obtained fruit of those agreements other that the

5 Google Remedy Opn. at pp. 40-41.

6 Google Remedy Opn. at pp. 104-105.

7 See Final Judgment in *U.S. v. Microsoft Corp.*, case 94-1561, entered Aug. 21, 1995, 1995 U.S, Dist. LEXIS 20533 (D.D. C. Aug. 21, 1995).

'freedom' from competition it enjoyed for more than a decade. They do nothing to 'eliminate' the consequences of its exclusionary acts.[8]

In so ruling, Judge Mehta relied on the recent Ninth Circuit decision in *Epic Games, Inc. v Google LLC (In re Google Store Antitrust Litig.*), 2025 U.S. App. LEXIS 191185 (9th Cir. July 31,2025), where the Court approved of remedies which go beyond a mere prohibition of anticompetitive conduct, and ordered Google to affirmatively grant third-party access to Google Play Store's catalogue of apps and to allow such stores or platforms to be distributed through the Play Store.[9]

COURT REJECTS STRUCTURAL DIVESTITURE RELIEF AND CHOICE SCREENS

Significantly, Judge Mehta refused to accept Plaintiffs' proposed requirement that Google divest the Chrome browser and related technologies. The Court noted that divestiture is a 'drastic" remedy that should only be imposed with great caution. Further, Plaintiffs did not satisfy stricter causation standard for structural remedies, especially because the record contains ample evidence that lawful conduct (i.e., that Google Search was "best-in-class") played an important role in the maintenance of Google's monopoly.[10] For similar reasons, Judge Mehta rejected the proposal that the Final Judgment contain a provision allowing for the contingent divestiture of the Android operating system. The Court found that that this remedy "does not fit the wrong."[11]

The Court also rejected the requirement that Google include a "choice screen" in its devices and browsers. A "choice screen" is a user interface that asks consumers to make an explicit choice among a variety of products. Although Judge Mehta recognized that a remedy which promotes consumer choice is consistent with the goals of antitrust law, he declined to impose such a remedy since he regarded it as a form compelled product re-design, which he found was not a proper task of the Court, citing *New York*, 224 F. Supp. 2d at 158.[12] Judge Mehta noted that the use of "choice screens" in Europe had not changed the competitive landscape.

COURT REJECTS PAYMENT BAN TO DISTRIBUTORS

One of the most controversial and hotly-contested remedy proposals was to prohibit Google from making search-related payments to distributors of Google Search, Chrome or Google's new GenAI products, including payments for default or preferential placement as well as revenue share payments. The recipients of such payments, including Apple and Mozilla, objected to this proposal, since it would deprive them of significant revenue.[13] Proponents of this remedy argued that it would create an opportunity for other search

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8 Google Remedy Opn. at p. 108.

9 Google Remedy Opn. at p. 108.

10 Google Remedy Opn. at pp. 114-115.

11 Google Remedy Opn. at p. 119.

12 Google remedy Opn. at p. 188-190.

13 Google was paying over $20 billion per year to distributors such as Apple as revenue share or for default placement. Google Remedy Opn. at p. 119.

engine rivals to pay for and secure default placement, thus stimulating competition in the search engine market.

However, Judge Mehta rejected this remedy, finding that banning Google payments would pose a substantial risk of financial harm to browser developers, wireless carriers, and cellphone manufacturers, most of whom would still select Google search since it is best search provider[14]. Banning such payments would save Google money but could destroy smaller browser developers such as Mozilla and result in higher mobile phone prices and less innovative phone features. Balancing the competitive benefit against the potential consumer harm, Judge Mehta came down on the side of allowing Google to continue to make payments to distributors for default placement. As discussed, Judge Mehta was influenced by the recent emergence of GenAI as a threat to the primacy of traditional internet search.[15]

Some commentators have questioned whether allowing Google to continue to pay for default placement will undercut the effectiveness of other remedies and will allow Google to continue to dominate the search engine market. And some have questioned whether the remedy decision can be reconciled with the liability decision. Professor Erik Hovenkamp noted that Judge Mehta gave three arguments for not barring Google from paying for defaults—two of which were arguments Judge Mehta had rejected in the liability phase. Specifically, Judge Mehta, in the remedies opinion, accepted the arguments that: (1) Google's payments would promote browser competition and increase smartphone competition and (2) allowing smaller competitors to obtain default distribution (instead of Google) would be harmful, because currently available search engines from smaller rivals are not as good as Google Search. But, in the liability opinion, Judge Mehta had rejected those arguments. So, if the default payments actually promoted competition, why did the Court find them to be illegal in the first place?[16]

DATA-SHARING REMEDIES

Plaintiffs proposed a variety of data-sharing requirements, including certain Search Index data, three sets of User-side data, and certain Ads data. The aim of these requirements was to provide rivals with more query data and analysis to overcome the massive scale advantage which Google had obtained as a result of its exclusionary distribution agreements. Judge Mehta agreed that some compelled data sharing was a reasonable method of eliminating the consequences of Google's illegal action and well within the range of ordinary Sherman Act remedies.[17] It was also consistent with the rulings in the *Google Play Store* case, in the which the Ninth Circuit affirmed a remedy requiring Google to share its catalogue of apps with rivals to overcome Google's illegally amplified network effects by giving rivals a fair opportunity to establish themselves, and in the *Microsoft case,* in which the D.C. Circuit affirmed the compelled disclosure of APIs

14 Google Remedy Opn. at pp. 121-125.

15 Google Remedy Opn. at pp. 127-128.

16 Erik Hovenkamp (@ErikHovenkamp), X (September 5, 2025)

17 Google Remedy Opn. at p. 130.

and communication protocols to enable interoperability between Microsoft's Windows operating system and rival middleware vendors.[18]

However, after a lengthy analysis of the data-sharing remedy proposal, Judge Mehta narrowed the datasets to be disclosed to tailor the remedy to the nature of Google's anticompetitive conduct[19], and also limited the frequency of disclosure. The Court also declined to require disclosure of certain data-analytics tools which Google had developed for internal use, and certain data used to train Google's GenAI tool. To protect Google's incentive to innovate to avoid "cloning" of Google technologies, the data-sharing remedy involves no compelled disclosure of IP or trade secrets, such as algorithms, ranking signals, or post-trained LLMs used to deliver GenAI results[20]. The Court also rejected the proposal to require disclosure of Ads data, finding that there was no showing that disclosing such data would increase competition in the general search text ads market.

SEARCH SYNDICATION REMEDIES

"Search Syndication" refers to a commercial arrangement whereby one search engine provider supplies to search services to another entity (e.g., Yahoo contracting with Bing to provide search services for Yahoo users.)

Plaintiffs had proposed that Google offer broad search syndication services to "qualified competitors" for 10 years at no more than "marginal cost". Judge Mehta agreed that some syndication remedy was appropriate, but Plaintiffs' proposal must be narrowed. The rationale for some syndication remedy is that rival search engines will need some years to build up their own search indexes and algorithms to try to match Google's quality, so such rival should be able to "borrow" Google's better results for a while. But Judge Mehta ruled that the scope of syndication for both search engines and search text ads should be restricted, limited to a term of five years, and offered to rivals on ordinary commercial terms, not a "marginal cost"[21].

OTHER BEHAVIORAL AND ADMINISTRATIVE REMEDIES

The Court agreed with Plaintiffs that a Technical Committee should be established to aid the Plaintiffs and the Court in administering and enforcing the Final Judgment. The Technical Committee would advise regarding which rivals would be "Qualified Competitors"; recommend reasonable data security standards for such "Qualified Competitors"; advise on an appropriate cap on User-side Data disclosure; help formulate a tapering rate for search syndication; and other matters.

However, Judge Mehta rejected Plaintiffs'' proposal that Google fund a "public education" campaign regarding the case and be required to give advance notice of any investment in a GenAI or search company, beyond what is already required under the Hart-Scott-Rodino Act (which requires notification of mergers or acquisitions above

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18 Google Remedy Opn. at p. 130, discussing *In re Google Play Store*, 2025 WL 2167402, at *16-17 and *Massachusetts*, 373 F. 3d at 1216-25.

19 Google Remedy Opn. at pp. 128-146.

20 Google Remedy Opn. at pp. 162-163.

21 Google Remedy Opn. at 9.

$126.4 million). The Court also rejected proposed language characterized as "anti-circumvention" and "anti-retaliation" provisions as overbroad. Plaintiffs' proposal to require some further disclosures to advertisers was rejected. The Court did agree with a provision under which Google will be required to disclose material changes to its ad auction rules to promote greater transparency and to prevent Google from increasing prices to advertisers by secretly "fine-tuning" its ad auction procedures.[22]

THE COURT REJECTS PROHIBITIONS ON "SELF-PREFERENCING"

A major topic of discussion among antitrust practitioners is whether "self-preferencing" by dominant "Big Tech" platforms- i.e., favoring or advantaging its own software services as opposed to those offered by rivals- should be deemed to be "exclusionary" conduct.

Plaintiffs had proposed provisions to restrict Google from engaging in a wide variety of "self-preferencing" behavior.[23] Judge Mehta rejected these provisions "for reason both legal and factual". First, he ruled that that such behavior was not of the same type or class of illegal conduct which was the subject of this case. Second, the proposed ban on "self-preferencing" "goes too far in that it would hamstring Google's ability to compete."[24] This is especially so since other companies in the GenAI space leverage their own products to distribute their GenAI technologies- Meta delivers its GenAI models through Instagram and WhatsApp; xAI makes Grok available through X; Microsoft had integrated Copilot into Edge and Bing. As Judge Mehta states, "The court will not hobble Google's competitiveness by prohibiting self-preferencing of its own GenAI technologies, when that is precisely how the emerging-and highly competitive- GenAI marketplace operates."[25]

TERM OF FINAL JUDGMENT

Rather than accept the Plaintiffs proposal that the Final Judgment last ten (10) years, the Court ruled that a six (6) year term is appropriate. This contemplates that it will take one year to establish the Technical Committee and the processes for implementation of the Judgment, and then the Judgment would be in force for five years (not counting time for appeal). Judge Mehta noted, "Technological advancement and product differentiation are what will change market dynamics, not a decade-long judicial decree."[26] But his opinion does leave open the possibility of continued judicial oversight and potential changes to his remedy. For example, in a footnote, he wonders about the possibility that Google would only be allowed "to make payments for distribution but not for default distribution." He then states that "[w]ithout a more substantial record" on this possibility, "the court is

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22 In a separate case pending in the Eastern District of Virginia, Google was found to have violated Section 2 with respect to certain markets relating to ad technologies, and is awaiting a remedy decision in that case, which may affect rules for ad auctions.

23 Google Remedy Opn. at p. 215.

24 Google Remedy Opn. at p. 217.

25 Google Remedy Opn. at pp. 217-218.

26 Google Remedy Opn. at p. 221.

presently ill-equipped to consider it."[27] It is not clear whether he is envisioning some later proceeding on this possibility.

CONCLUSIONS, QUESTIONS, AND LESSONS

The ink is barely dry on the decision but, five years into this historic case, we can draw some conclusions and ask some questions.

First, the antitrust fight against Google is probably not even at halftime. There will be disputes over the final language of the Final Judgment; there will be appeals of Judge Mehta's opinion—perhaps from both Google and the United States; and there will be six years of antitrust oversight over Google, by the Technical Committee and the Court. And there soon will be a remedies opinion in the Google AdTech case. It is quite possible that the Google cases, like the Microsoft cases of the 1990s, will play out over a decade. Just as each historic Microsoft opinion begat more historic proceedings and opinions, the 2020s Google cases (so far, Search, Ad Tech, and Play Store) might lead to new cases, and Google roman numerals might be in the future.

Second, we will know whether Judge Mehta's decision went far enough when we access whatever "AI/Search" is in six years. Will an overwhelming majority still access the world's information through a Google property? Will there be new companies offering access points? Will some new company challenge Google in the wake of Google's antitrust troubles, just as Google challenged Microsoft in the wake of Microsoft's antitrust cases? This said, perhaps technology will have advanced in some way that the *Microsoft/Google* framework no longer governs. Both cases assumed users would access a single, universal source of information (the internet) through a single gate. It might be that concepts like desktops and search engines will soon be as quaint as a DOS prompt.

Third, the most important words in the judgment might be "qualified competitor." These companies will be able to benefit from the data-sharing and syndication remedies. Judge Mehta made clear that the definition of "qualified competitor" should include companies offering GenAI products who plan to compete "with" general search engines.[28] The court, in line with the point above, imagined a future where some form of AI renders "Search" obsolete. He wrote that both AI and Search have the "capacity to fulfill a broad array of informational needs."[29] So, while the case was about Google's "10 blue links," the remedy decision imagines some other future—one beyond the ken of mere lawyers.

Fourth, company reputation matters a lot. In several places, Judge Mehta emphasizes the court's view that Google's monopoly was in large part attributable to its superior product (and that the superior product was in large part attributable to Google's innovation, not the power of defaults). "After two complete trials, this court cannot find that Google's market dominance is sufficiently attributable to its illegal conduct to justify divestiture."[30] He also repeated a passage from the liability opinion concluding that "Google has not achieved market dominance by happenstance. It has hired thousands of highly skilled

27 Google Remedy Opn. at p. 128, n. 14.

28 Google Remedy Opn. at p. 103.

29 Google Remedy Opn. at pp. 99-100.

30 Google Remedy Opn. at p. 221.

engineers, innovated consistently and made shrewd business decisions."[31] Contrast these views with the fact that in *Microsoft*, there was little question that Netscape had the superior product. Netscape was "the new competitor 'born' on the internet" that threatened Microsoft's entire business model. Here, Judge Mehta appears to see Google as more of a 1990s Netscape (particularly given looming AI competition) than a 1990s Microsoft, although today's Microsoft would disagree.

Fifth, the timing of government enforcement matters. The United States filed the Google Search case in October 2020 but the government could have filed it years earlier: seven years earlier, the FTC had declined to bring an enforcement action against Google, and the payments for defaults had been in place for years. Perhaps if the case had been filed earlier, Judge Mehta's remedies decision would have been different.

One of the driving forces for his caution—to the frustration of some—is that the status quo of defaults was so strong that it would be dangerous to disrupt it. He wrote that "Plaintiffs acknowledge the possibility of adverse market effects from a complete payment ban but implore to focus on the task of restoring competition to the relevant product markets. They believe that although there may be short-term harm to some market actors, they will benefit in the long run from increased competition. Acting in equity, however the court cannot be so myopic. It must consider the harms that might befall other market actors, even if that means, as here, forgoing a remedy that could help restore competition."[32]

Judge Mehta also seems to have been influenced by a limited runway left for Search. Given the emergence of GenAI, he also understood that the market dynamics have changed since the case was originally filed and even after the liability decision a year ago. So Judge Mehta might have thought an additional reason not to disrupt Search was that the harm had already been done and strong relief would not make a difference because of new technologies.

Imagine a Google Search case filed in 2013 or 2016, the status quo would have been less entrenched and there would have been no AI competition even on the horizon. Or imagine a Google Search case resolved in three or four years, rather than five years. Even a one year difference would have meant the AI threat would have been less apparent.

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Judge Mehta carefully and meticulously considered the remedy proposals. He approached his task with humility and caution, explaining that he does not want to be the regulator of the software industry over the next six years. Some would use different words than humility and caution, exasperated that the first part of the antitrust revolution ended with a whimper. The jury will be out for several years for the final verdict on his decision.

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31 Google Remedy Opn. at p. 77.

32 Google Remedy Opn. at pp. 125-126.

FORECLOSURE ISSUES IN VERTICAL HEALTHCARE MERGERS

By James F. Nieberding, Ph.D.[1]

There has been an increase in consolidation and vertical integration in the U.S. healthcare industry. For example, one study found that the number of physicians in healthcare providers that have vertically integrated with hospitals has doubled in the past decade, a trend that is expected to continue with an increasing number of Medicare beneficiaries being directly affected by this vertical integration.[2] Another stated that the percentage of primary care physicians working in practices owned by a hospital or health system has risen dramatically in recent years, increasing by 57% over the period from 2010 to 2016.[3] And, an April 2024 report found that as of 2022, 58.5% of physician practices were owned by hospitals/health systems (or other downstream corporate entities), continuing a decade-long trend away from private practice.[4]

This consolidation and vertical integration in U.S. healthcare has been met with increased scrutiny from policymakers and antitrust agencies.[5] The focus on acquisitions involving hospital systems, large insurance companies, health care providers (e.g., physician groups), and pharmacy benefit managers (PBMs) has resulted in high-profile merger investigations and enforcement actions. One area of increased antitrust concern involves the consolidation of upstream healthcare providers with downstream hospitals or large insurance companies into vertically-integrated health systems.

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1 Founder and Principal Consulting Economist of North Coast Economics, LLC (established in 2011). Nieberding previously was Principal in the *Global Competition Policy Group* at LECG (Washington DC) from 1998 through 2010.

2 Soroush Saghafian et. al. (2023), "The Impact of Vertical Integration on Physician Behavior and Health care Delivery: Evidence from Gastroenterology Practices," NBER Working Paper 30923. See also, "What Have We Learned About the Economic Effects of Vertical Integration?" RAND Center of Excellence on Health System Performance, https://www.rand.org/health-care/centers/health-system-performance/what-have-we-learned/verticalintegration.html; and Li et. al. (2025), "How do Hospitals Exert Market Power? Evidence from Health Systems and Commercial Health Plan Prices," Health Affairs Scholar, 3(1).

3 James Godwin et. al. (2021), "The Association between Hospital-Physician Vertical Integration and Outpatient Physician Prices Paid by Commercial Insurers: New Evidence," The Journal of Health Care Organization, Provision, and Financing, Volume 58: pp. 1–10. Among other conclusions, these authors found that market-level hospital-physician vertical integration was positively associated with physician prices for select specialties.

4 PAI (2024). PAI-Avalere Study on Physician Employment-Practice Ownership Trends: 2019-2023. https://www.physiciansadvocacyinstitute.org/PAI-Research/PAI-Avalere-Study-on-Physician-Employment-Practice-Ownership-Trends-2019-2023.

5 See, e.g., "New Health Care Task Force Will Tackle Competition Problems in Health Care Markets," U.S. Department of Justice, May 9, 2024 (https://www.justice.gov/opa/pr/assistant-attorney-general-jonathan-kanter-announces-task-force-health-care-monopolies-and); "Request for Information on Consolidation in Health Care Markets," U.S. Federal Trade Commission, Docket No. ATR 102, 2024, February 29, 2024 (https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-2024-0022-0001-Request-for-Information-on-Consolidation-in-health-care-markets.pdf); and, "FTC to Study the Impact of Physician Group and Healthcare Facility Mergers," January 14, 2021 (https://www.ftc.gov/news-events/news/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers).

Vertical mergers involve the combination of businesses that operate in different levels of a multi-step supply chain (e.g., a merger between an upstream supplier of an input and a downstream firm that purchases it).[6] Post merger, the new vertically-integrated firm participates in multiple stages of the supply/production chain. Vertical transactions in the healthcare marketplace similarly combine businesses operating at different levels of the healthcare supply chain. These may take the form of downstream hospital systems or health insurance companies merging with or acquiring independent upstream physician groups/practices, healthcare providers, or home health agencies. It is often the case that prior to such an acquisition, the upstream business being acquired is a competitor to an upstream business already owned by the downstream buyer.

This article reviews antitrust issues involving vertical foreclosure that are applicable in the healthcare industry. It then discusses their relevance to merger reviews involving UnitedHealth Group Inc.'s acquisition of DaVita Medical Group (completed in 2019), UnitedHealth Group Inc.'s acquisition of Amedisys (recently cleared by antitrust officials with divestitures), and the vertical integration of health insurers (or other entities) and PBMs.

I. ANTITRUST ISSUES OF VERTICAL MERGERS

Vertical mergers can harm competition if the newly merged firm has the ability and incentive to reduce or eliminate rival firms' access to upstream inputs or downstream customers/markets. Competitive concerns are amplified if the transaction serves to enhance or entrench the market power of the new firm's upstream or downstream business.[7] The economics of anticompetitive foreclosure, including the effect of a vertical merger between an upstream and downstream business, have been described and developed over decades of research.[8] Anticompetitive foreclosure can occur when a new vertically integrated firm either reduces or eliminates other downstream firms' access to an upstream input needed to effectively compete in the downstream market. This so-called "input foreclosure" will raise these downstream firms' costs or cause them to seek alternative input suppliers. In particular, input foreclosure arises when the newly merged firm's upstream business either completely stops supplying a key input to competing downstream firms (complete input foreclosure), or continues to do so but at a higher price or on less favorable terms compared to the pre-merger situation (partial input foreclosure). This kind of foreclosure is a raising-

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6 Firms operating before a particular point in the supply chain are 'upstream' and firms operating at subsequent steps are 'downstream'.

7 A merger (vertical or horizontal) can result in an increase in market power due to either unilateral or coordinated effects. Coordinated conduct is only profitable for a firm post-merger if its rivals accommodate it (e.g., all firms agree to raise prices). Unilateral effects arise when a single firm has sufficient market power (post-merger) to profitably increase prices or engage in other anticompetitive behavior independent of their rivals' pricing or competitive strategy.

8 A seminal economics paper in this regard is Janusz A. Ordover, Garth Soloner, and Steven C. Salop (1990), "Equilibrium Vertical Foreclosure," The American Economic Review, 80(1), pp. 127-142. See also, Patrick Rey and Jean Tirole (2007), "A Primer on Foreclosure," Chapter 33 in Armstrong, M. and Porter, R., Eds., Handbook of Industrial Organization Volume 3; Riordan, Michael (2008), "Competitive Effects of Vertical Integration," in Buccirossi, P., Ed., Handbook of Antitrust Economics, MIT Press, pp. 145-182, and Steven C. Salop and Culley, Daniel P., "Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners," December 8, 2014, available at https://ssrn.com/abstract=2522179. In other theories of competitive harm discussed in the literature, vertical mergers can also facilitate downstream or upstream collusion.

rivals-cost strategy and it can disadvantage downstream rivals of the newly merged firm. The incentive to engage in input foreclosure increases the more the downstream business of the newly merged firm benefits from sales lost by foreclosed downstream rivals.

Vertical foreclosure also can occur when the downstream business of the newly merged firm reduces or eliminates access of upstream firms to the downstream business' customers or markets. This so-called "customer foreclosure" may allow the downstream business of the newly merged firm to disadvantage rivals to its upstream business by refusing to buy– or reducing its purchases of–inputs from these upstream rivals, possibly impacting their ability to effectively compete. One scenario is that post-merger, the downstream business of the merged firm only buys inputs from its upstream business and stops purchasing inputs completely from upstream competitors (total customer foreclosure). Another is that the downstream business of the merged firm significantly decreases purchases from upstream competitors (or otherwise disadvantages them) thereby reducing their sales opportunities (partial customer foreclosure).

An additional concern in the literature regarding a vertical merger is that it may reduce future horizontal competition if the merger eliminates or diminishes the incentive for one of the merging firms to enter the business that is either upstream or downstream of its current position. Another concern relates to a vertical merger forming a barrier to entry to future firms in one or both of the upstream and downstream markets. For example, vertical integration may present an entry barrier to the downstream market if upstream foreclosure confers a cost advantage on the vertically-integrated firm. Potential entrants may also face higher costs of entry if they have to enter at more than one level of the supply chain in order to effectively compete with the newly merged firm.

The potential anticompetitive effects of vertical integration can be mitigated or offset by potential merger-specific efficiencies and cost savings. For example, if there is existing market power upstream, a vertical merger that allows the integrated firm to obtain inputs at a lower cost can eliminate double marginalization which can be beneficial for consumers and efficiency. Vertical integration also can solve problems associated with inefficient input substitution, as well as enable the merged firm to realize economies of scope, facilitate synergies, and save on transactions costs.[9]

The anticompetitive effects of a vertical merger depend on the credibility of the theory of harm due to foreclosure. If foreclosure is not credible, then increasing vertical integration is likely to be efficiency enhancing and lead to lower prices. If foreclosure is a valid concern, then harm to competition must dominate any efficiency benefits for the vertical integration to be welfare reducing.

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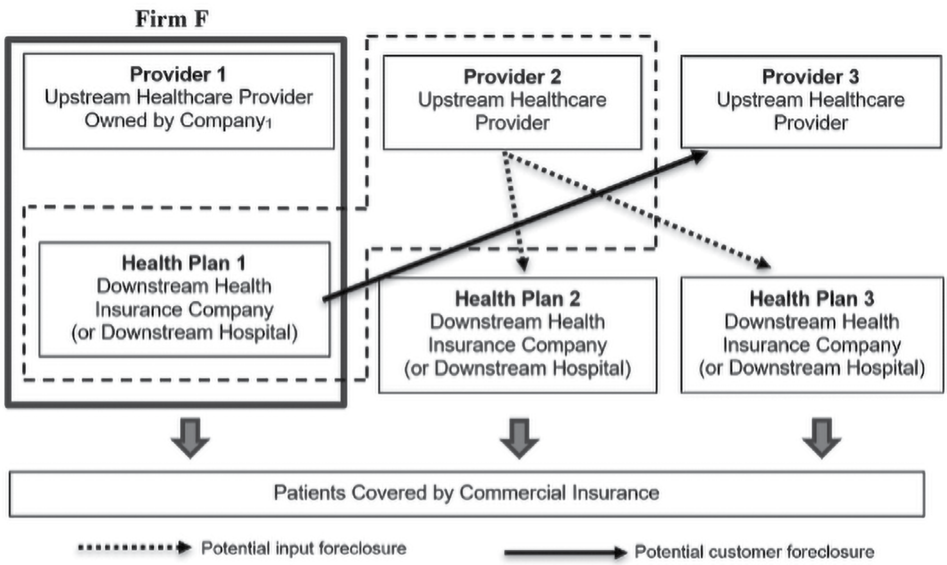
9 Economies of scope mean that products are more cheaply produced by one firm than by two or more firms. Transaction costs are those that are incurred when firms use external markets prior to vertical integration to buy inputs (e.g., costs of searching for inputs, negotiating supply contracts, monitoring and enforcing these contracts). Inefficient input substitution may occur when a downstream good is produced using substitutable inputs in variable proportions, and one of the inputs is sold at a price in excess of marginal cost. If so, the downstream firm has an incentive to substitute away from the more expensive input even though this may not be efficient. See, e.g., OECD (2019), "Vertical Mergers in the Technology, Media and Telecom Sector," pp. 27-29. https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf.

II. VERTICAL FORECLOSURE IN THE HEALTHCARE INDUSTRY

The rise in vertical integration in the U.S. healthcare industry has raised concerns about market foreclosure.[10] For example, large hospital systems that acquire upstream physician practices may steer patient demand toward their own downstream hospital services and away from rival hospitals, or large insurance companies acquiring upstream healthcare providers may steer demand toward their own downstream insurance networks. Figure 1 presents a simplified diagram illustrating how input and customer foreclosure can arise in vertical mergers in the healthcare industry.[11] Here, Firm F (denoted by the solid box) is a vertically integrated firm comprised of an upstream healthcare practice (Provider 1) and a downstream health plan (Health Plan 1).[12] In this industry, the upstream healthcare providers produce the services, the downstream health insurers offer a bundle of upstream products via their health plans, and consumers purchase their preferred plan which gives them access to the provider network within the chosen plan.

Figure 1



10 Christopher M. Whaley and Xiaoxi Zhao (October 2024), "The Effects of Physician Vertical Integration on Referral Patterns, Patient Welfare, and Market Dynamics," Journal of Public Economics, vol. 238. See also, Ayse Sera Diebel (2017), "Vertical Integration in the U.S. Health Care Market: An Empirical Analysis of Hospital-Insurer Consolidation," The Graduate Center at CUNY, Department of Economics, (who finds that vertically-integrated health systems engage in both upstream and downstream foreclosure). https://www.gc.cuny.edu/sites/default/files/2021-07/AyseSeraDiebel_JMP.pdf.

11 For a more detailed discussion of vertical foreclosure issues in the healthcare industry, see Alexis J. Gilman and Akhil Sheth, "Antitrust Analysis of Vertical Healthcare Mergers," Practical Law (April/May 2020); and, Josh Lustig et. al., "Economic Tools for Analyzing Vertical Mergers in Health care," CPI Antitrust Chronicle, May 2020.

12 Alternatively, Health Plan 1 1 could be a large downstream hospital system that owns or contracts with upstream healthcare provider, Provider 1.

Suppose Firm F proposes to acquire upstream healthcare practice Provider 2, a popular healthcare provider. This transaction is denoted by the hashed shape. In this context, the potential for input foreclosure might arise if post-merger, two things were to happen: (a) Firm F no longer allowed Provider 2 to participate in the competing downstream insurance networks offered by Health Plans 2 and 3, and (b) contracting with Provider 3 is not sufficient to enable Health Plans 2 and 3 to compete in the downstream market. This could lessen the attractiveness of Health Plans 2 and 3 to insureds, perhaps driving some of them to enroll with Firm F's Health Plan1. The potential for input foreclosure would also be present if Firm F were to allow Provider 2 to participate in the competing downstream networks offered by Health Plans 2 and 3, but at higher contracted reimbursement rates. For example, input foreclosure also might result if post-merger, (a) Provider 2 charges Health Plans 2 and 3 higher reimbursement rates, and (b) Health Plans 2 and 3 have substantially inferior alternatives such that they must pay those higher rates to Provider 2. This could force Health Plans 2 and 3 to raise premiums, thereby making them less competitive with Firm F and Health Plan 1. Either type of vertical input foreclosure could decrease the pre-merger horizontal competition among Health Plans 1, 2, and 3, possibly raising prices to insurance customers. Input foreclosure is represented by the two dashed arrows in Figure 1.

Customer foreclosure could arise post-merger if Health Plan 1 no longer included a competing upstream healthcare provider (such as Provider 3) in its insurance network. Because Provider 3 would no longer be in Health Plan 1's insurance network, this might cause some of Provider 3's patients to switch to healthcare providers under contract with Health Plan 1 (i.e., Providers 1 and 2), perhaps reinforcing the market power of Firm F. Moreover, if Provider 3 becomes less of a competitive force post-merger, the transaction could further reduce the pre-merger upstream competition among Providers 1, 2, and 3 over and above having Provider 2 removed as an independent healthcare provider. This may result in higher prices for patients of these healthcare providers. Customer foreclosure is represented by one dark arrow in Figure 1.

The literature recognizes that successful input and customer foreclosure depends on several factors. Specifically, foreclosure will likely be more anticompetitive if 1) the market shares of the merging upstream and downstream businesses in the geographic and product markets are relatively high; 2) there are few (if any) viable and readily available outside options for downstream firms to source the foreclosed input or for upstream firms to sell the foreclosed input; 3) the merged firm has the ability and incentive (i.e., it is feasible and profitable) to engage is such foreclosure based on the relevant margins and the volume of business diverted to it from foreclosed rivals, and 4) the expected or likely anticompetitive effects outweighed the expected or likely cost savings and/or other procompetitive effects.

There also are recognized potential benefits associated with vertical integration in the healthcare industry such as eliminating double marginalization and duplicative costs, providing incentives for increased investment, realizing benefits of quality-of-care coordination, aligning incentives within the vertical chain to achieve operational efficiencies, and generating economies of scale or scope.[13] The analysis of the ability and incentive of a vertical merger to likely result in anticompetitive foreclosure, as well as the

13 See, e.g., Capps et. al. (May 2021), "Stacking the Blocks: Vertical Integration and Antitrust in the Healthcare Industry," CPI Antitrust Chronicle, 2(1), pp. 14-24.

weighing of potential anticompetitive effects against potential efficiencies, needs to be empirically investigated on a case-by-case basis.

III. EXAMPLES OF HEALTHCARE MERGERS THAT RAISED VERTICAL FORECLOSURE ISSUES

Three transactions reviewed by U.S. antitrust regulators involving the health insurance industry are discussed next. These acquisitions involved upstream physician groups, home healthcare/hospice providers, and PBMs. Each featured the type of vertical foreclosure issues discussed in this paper as a theory of potential competitive harm.

A. Health Insurer Acquisitions of Physician Groups

UnitedHealth Group Inc. ("UHG"), the largest U.S. health-services company by revenue, announced in December 2017 that it would acquire DaVita Medical Group ("DMG"), a large physician network. This acquisition raised both horizonal and vertical antitrust issues in the relevant product and geographic markets identified by the FTC.[14] In Las Vegas, UHG was described as a vertically integrated health insurer marketing/selling downstream health insurance plans while also employing upstream physicians/specialists through its Optum business. DMG also employed or affiliated with many upstream physicians/specialists in the Las Vegas area. In particular, the FTC alleged that DMG and UHG's Optum were the two largest providers of upstream managed care provider organization ("MCPO") services to downstream Medicare Advantage ("MA") health insurers in the Las Vegas area. These health insurers needed to contract with MCPOs, like those of UHG's Optum business and DMG, to create a "marketable" network of healthcare providers for their enrollees.

The FTC claimed that UHG's vertical merger with DMG would eliminate horizontal competition in Las Vegas between the parties' upstream MCPOs (like Providers 1 and 2 in Figure 1) that participated in downstream MA insurers' networks. The FTC claimed that this upstream MCPO competition had spurred each firm to provide more attractive, lower-cost options for downstream MA insurers, and that the proposed merger would diminish this pre-merger upstream competition. The FTC also alleged that the post-merger combination of UHG and DaVita's MCPO's for MA members in Las Vegas would result in an 80% market share, resulting in a highly concentrated upstream market.

The FTC also raised vertical foreclosure concerns regarding UHG's downstream health insurance plans, noting that its MA plans had over 50% market share in the Las Vegas area. The FTC alleged that because the merger would lead to input foreclosure by giving UHG control over DaVita's (upstream) physician group (like Provider 2 in Figure 1), this "competitively significant input" would not be available for rival downstream insurers to UHG offering MA plans in Las Vegas (like Health Plans 2 and 3 in Figure 1), or only available on less favorable terms. That is, the FTC alleged that UHG could have negotiated higher rates with rival MA plans (i.e., a raising-rivals'-costs strategy due to partial input foreclosure), or have refused to contract with them altogether (i.e., complete

14 The FTC case documents can be found at https://www.ftc.gov/legal-library/browse/cases-proceedings/181-0057-unitedhealth-groupdavita-matter. Gilman and Sheth (2020) and Lustig et. al. (2020) discuss the antitrust concerns of this transaction.

input foreclosure), thereby reducing competition in the provision of MA plans in the Las Vegas area. The FTC also alleged that post-merger, the combined company would have a greater ability and incentive to raise its own MA rates and/or have reduced incentive to improve the quality and benefits of its MA plans. While the FTC initially challenged this merger, it entered into a Consent Agreement in 2019 allowing it but with divestitures in Nevada.

B. Health Insurer Acquisitions of Home Health Care and Hospice Providers

Another proposed transaction in the healthcare industry that also raised foreclosure concerns involves (forward) vertical integration into home health agencies. In February 2023, UHG acquired LHC Group, a nationwide home health and hospice provider, which joined UHG's upstream health services division Optum. This transaction was not challenged by antitrust agencies presumably because UHG was not present in the home health and hospice marketplace at that time.[15] In June 2023, UHG announced plans to acquire Amedisys, another nationwide home health and hospice service provider (this is like the transaction described in Figure 1). On November 12, 2024, the US DOJ's Antitrust Division and the state Attorneys General (AG) of Maryland, Illinois, New Jersey, and New York filed a complaint challenging the transaction, alleging that the pre-merger competition between UHG's LHC (part of Optum) and Amedisys in "hundreds of local markets across America" would be eliminated.[16] Amedisys initially moved to dismiss the complaint citing a failure to properly define the geographic markets in which anticompetitive effects might occur regarding home health and hospice providers.[17] The merging parties subsequently dropped this motion after the DOJ and state AGs provided more detail about the geographic markets where competition allegedly would be affected by the proposed transaction.[18] On August 7, 2025, the DOJ announced a Proposed Final Judgement allowing UHG's acquisition of Amedisys but requiring the companies to sell at least 164 facilities across 19 states.[19]

The DOJ's theory of harm centered on the horizontal upstream pre-merger competition between Optum's LHC Group and Amedisys that would be impacted post-merger (like the pre-merger competition between Providers 1 and 2 in Figure 1). However, the framework presented in Figure 1 also suggests several vertical foreclosure possibilities of the UHG-Amedisys transaction similar to those in the UHG-DMG transaction. For example, one vertical concern could be partial or complete input foreclosure if Amedisys (Provider 2 in Figure 1) harms downstream competition post-merger by either cutting off

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15 For a discussion of the antitrust issues regarding the UHG and other vertical transactions in the healthcare industry, see Kevin Hahm and Brian J. Miller (Fall 2024), "A Framework for Evaluating Vertical Integration Among Payers and Providers," Antitrust, 39(1), pp. 45-51.

16 The complaint can be found at https://www.justice.gov/opa/media/1376671/dl.

17 The Amedisys Motion to Dismiss (January 8, 2025) can be found at https://appliedantitrust.com/14_merger_litigation/cases_doj/unitedhealth_amedisys2024/2_dmd/unitedhealth_amedisys_dmd_dismiss_motion2025_01_08memo.pdf.

18 Matthew Perlman, "UnitedHealth Drops Bid to Toss Home Health Deal Challenge," Competition, Law360, February 6, 2025.

19 https://www.justice.gov/opa/pr/justice-department-requires-broad-divestitures-resolve-challenge-unitedhealths-acquisition.

access or raising reimbursement rates to UHG's downstream competitors (Health Plans 2 and 3 in Figure 1) in certain areas. Another concern could revolve around customer foreclosure in that UHG's downstream entity (Health Plan 1 in Figure 1) might only (or predominantly) contract with its own upstream home health and hospice providers (LHC and Amedisys) post-merger, and no longer deal with unaffiliated upstream entities (such as Provider 3 in Figure 1).

C. Mergers Involving Health Insurers and PBMs

Vertical foreclosure issues also have arisen in the context of consolidation involving health insurers and PBMs. PBMs serve as the "middleman" between drug manufacturers/distributors and health insurance companies, and their combination into a vertically integrated business is an increasingly more frequent occurrence.[20] One study finds that the share of Medicare Part D beneficiaries enrolled in an insurance plan that is vertically integrated with a PBM increased from about 30% to 80% between 2010 and 2018.[21] This study summarizes the input and customer foreclosure concerns when downstream health insurers and upstream PBMs vertically integrate.

> Input foreclosure occurs when a PBM owned by an insurer increases the costs or reduces the quality of its services provided to insurers who compete with its parent insurer. For example, the PBM could pass through a larger share of manufacturer rebates to its parent insurer than it passes through to rival insurers. The degree of input foreclosure depends on the level of competition in the PBM market. If PBM markets have many competitors, then input foreclosure is less likely as rival health plans experiencing input foreclosure can switch to one of many standalone PBMs. However, if PBM markets are highly concentrated then input foreclosure is more likely as rival plans have limited options to switch to another PBM.
>
> Customer foreclosure, by contrast, occurs when the downstream firm of a merged entity no longer purchases inputs from its upstream competitors. For instance, when an insurer and PBM consolidate, the insurer's health plans will always use services from its own PBM, thus reducing the potential number of clients for standalone PBMs. The reduction in the potential customer base could ultimately lead standalone PBMs to exit the market which would further increase the concentration of PBMs.

Such acquisitions are under increased antitrust scrutiny and the FTC is currently investigating the competitive impact of vertically integrated PBMs.[22]

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20 José R. Guardado, Ph.D., "Competition in Commercial PBM Markets and Vertical Integration of Health Insurers with PBMs: 2023 Update," Policy Research Perspectives, American Medical Association, 2023.

21 Gray et. al., "Disadvantaging Rivals: Vertical Integration in the Pharmaceutical Market," NBER Working Paper No. 31536, August 2023.

22 "FTC Further Expands Inquiry Into Prescription Drug Middlemen Industry Practices," June 8, 2023. See https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-further-expands-inquiry-prescription-drug-middlemen-industry-practices.

These foreclosure concerns were at issue when CVS Health Corp.–which also owned the country's largest PBM (Caremark)–sought to acquire Aetna Insurance Inc. in December 2017. The DOJ filed a complaint on October 10, 2018 to enjoin the proposed acquisition while at the same time proposing a Final Judgment allowing it to proceed if Aetna divested certain lines of business. Subsequently, numerous public comments were submitted to the DOJ about the proposed Final Judgment, several claiming that it failed to address the vertical concerns raised by the transaction.[23]

The input foreclosure concern was that Aetna's downstream insurer rivals either would not be able to access the CVS PBM (which was said to have a national market share of 25%), or would face higher costs of doing so post-merger. In other words, CVS-Aetna could raise Aetna's rivals' costs for PBM services which would have anticompetitive effects in the downstream insurance market. The customer foreclosure concern was that upstream rivals to the CVS PBM might be foreclosed from having Aetna as a customer. Specifically, several comments claimed that by consolidating with Aetna, CVS would control access to Aetna. This would give the merged firm the ability to cut off rival PBMs' access to Aetna's insurance network thereby impacting competition in the upstream retail pharmacy and PBM markets.

In rejecting these vertical foreclosure concerns, the DOJ claimed they "investigated the potential for vertical harms from the merger" and "concluded that vertical harms were unlikely to occur and did not allege any harm related to vertical concerns in its Complaint."[24] The court also dismissed concerns related to vertical foreclosure, concluding that Aetna's rivals had upstream PBM alternatives other than the CVS PBM, so that "if CVS were to raise its PBM prices, customers like Wellcare could simply switch to a less expensive PBM or stop contracting for those PBM services altogether." The court also stated that if CVS were to raise its PBM prices post-merger, "it would risk losing PBM market share without disadvantaging Wellcare or other competing insurers at all."[25]

IV. CURRENT STATE OF POLICY GUIDANCE ON VERTICAL FORECLOSURE

In 2020, U.S. antitrust agencies updated their guidance on vertical transactions when the DOJ and FTC issued the Vertical Merger Guidelines (replacing the 1984 Non-Horizontal Merger Guidelines), though this was short-lived as the FTC withdrew them the following year. The 2023 Merger Guidelines broadly make reference to vertical foreclosure in Guideline 5, noting that attention will be given to vertical mergers which involve "important inputs" used by rivals to the merger firm, or involve "increase[d] access to rivals' competitively sensitive information" affecting their ability to compete.[26]

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23 The DOJ case documents, including all comments submitted about the Final Judgement, can be found at https://www.justice.gov/atr/case/united-states-and-plaintiff-states-v-cvs-health-corp-and-aetna-inc. Gilman and Sheth (2020), infra note 9, also discuss the foreclosure concerns of this transaction.

24 See https://www.justice.gov/atr/case-document/file/1131901/dl?inline.

25 "Memorandum Opinion," Judge Richard J. Leon, U.S. District Court for the District of Columbia, September 4, 2019. Gilman and Sheth (2020), infra note 9, also discuss the foreclosure issues and legal outcome of the CVS-Aetna transaction.

26 2023 Merger Guidelines, pp. 13, 18.

Several matters illustrate the unsettled nature of policy enforcement regarding vertical mergers. The 2018 AT&T/Time Warner transaction, the first vertical merger litigated to conclusion by the DOJ since 1977, was allowed to close (upheld by the D.C. Circuit Court of Appeals) and prominently featured the elimination of double marginalization as a procompetitive justification.[27] In 2023, the FTC successfully stopped Illumina, the sole upstream supplier of a popular multi-cancer early detection test, from acquiring Grail, a downstream firm using this input, as the appellate court determined the merged company would have the ability and incentive to foreclose Grail's downstream rivals and substantially lessen competition in the relevant market. Notably, the court dismissed Illumina's claim that the merger would eliminate double marginalization.[28] In February 2025, a federal district court denied the FTC's efforts to stop Tempur Sealy, the largest (upstream) mattress manufacturer, from buying Mattress Firm, the largest U.S. (downstream) mattress retailer.[29] The FTC alleged this vertical merger would allow Tempur Sealy to block or limit access by rival upstream mattress manufacturers to Mattress Firm stores thereby substantially lessening competition. However, the court did not agree with the FTC's analysis regarding the merged firm's ability and incentive to foreclose competition in a product market limited to "premium mattresses." Regarding the healthcare industry, Miller and Hahm (2024) discuss the trend towards increased vertical integration through mergers and affiliations, particularly between payers (e.g., health insurers/plans) and providers. These authors state that "[v]ertical mergers will likely represent the next wave of health care consolidation, but the relatively few Agency enforcement actions provide only limited guidance on some of the nuances of vertical healthcare transactions."[30]

V. CONCLUDING REMARKS

Vertical mergers generally raise fewer antitrust concerns than horizontal ones because they do not reduce the number of competitors post-merger and have the potential to be procompetitive. Consequently, proving how foreclosure theories of harm translate into anticompetitive outcomes is often challenging. The foreclosure issues discussed in this article are ones we should expect to see going forward as vertical integration continues in the healthcare industry. However, since vertical mergers do not necessarily provide the ability and/or incentive for foreclosure,[31] whether the new Guidelines or information from recently litigated cases can be used to identify beneficial acquisitions (i.e., efficiency enhancing) from anticompetitive ones remains to be seen.

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27 Carlton, Dennis W., Giozov, Georgi V., Israel, Mark A., and Shampine, Allan L. (2022) "A Retrospective Analysis of the AT&T/Time Warner Merger," Journal of Law and Economics: Vol. 65: No. 6, Article 6.

28 https://cases.justia.com/federal/appellate-courts/ca5/23-60167/23-60167-2023-12-15.pdf?ts=1702686627.

29 https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2024cv02508/1965404/515/.

30 Op. cit., Hahm and Miller, (2024), p. 46.

31 See, e.g., Alessandro S. Kadner-Graziano "Vertical Mergers Without Foreclosure," Journal of Economics & Management Strategy, 2024.

COMPETITION IN THE INFORMATION AGE

By James Mellsop, Mark Ponder, Veronica Postal, and John Scalf[1]

Data is playing an increasingly central role in the modern economy. The large-scale collection and analysis of data has allowed firms to become more efficient while providing customers with improved product quality at lower prices. It has also allowed firms to tailor their product offerings to better meet the needs of disparate consumer segments. However, while acknowledging the procompetitive uses of this resource, antitrust authorities around the world have also raised concerns about its potential to harm competition. In this article, we examine three theories of harm that have emerged from recent antitrust enforcement in the United States: data as a strategic input for product development, the anticompetitive misuse of consumer data, and access to competitively sensitive data to unfairly disadvantage rivals. We explore the broader context of the economic principles underpinning these theories, and the related case law.

The digital revolution that has characterized the Information Age has resulted in a substantial share of economic activity moving online. This shift has been amplified by innovations in computer science and information technology over the past two decades, as mobile technology, more powerful computers, more sophisticated algorithms, and artificial intelligence ("AI") have become widely available and incorporated in many products adopted by consumers and firms. This transformation in the key locus of economic activity has been accompanied by an unprecedented expansion in the availability and usefulness of data. Many firms have started collecting and processing vast amounts of data, relying on the insights provided by these data to guide their decision making. Data affords firms a better understanding of what consumers demand, allowing firms to produce more desirable products at cheaper prices. However, concerns have been expressed that data can potentially also become an avenue to unfairly disadvantage rivals or a risk to consumer privacy. While the economic literature has not formed a clear consensus on how the unprecedented availability of data in the digital economy has impacted market structure or consumer welfare, regulators and policymakers have taken notice, and have started more closely scrutinizing how firms and digital platforms use data.

In his Executive Order on Promoting Competition in the American Economy, former U.S. President Joe Biden called on his Administration to "enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of large Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects."[2] Furthermore, the executive order called on the U.S. Federal Trade Commission ("FTC") to address "persistent and recurrent practices that inhibit competition" by exercising its statutory rulemaking authority specifically with regard to "unfair data collection and surveillance practices

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2 Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

that may damage competition, consumer autonomy, and consumer privacy."[3] In line with this mandate, a review of enforcement actions by the U.S. Department of Justice ("DOJ") and FTC in recent years shows that the agencies have initiated a number of lawsuits and investigations that delved into the role of data in potentially granting firms an anticompetitive advantage or in harming consumers. While the Trump administration has signaled a move away from the Biden administration's embrace of novel, expansive theories, it is still pursuing strong antitrust enforcement, especially in Big Tech and other key sectors, and is increasingly emphasizing the role of data, while relying on more traditional legal theories.

In this article, we examine recent antitrust enforcement investigations and lawsuits related to concerns over data. We explore three primary theories of harm considered by the agencies and unpack the economic principles underpinning these theories. Through this analysis, we aim to place recent regulatory perspectives within a taxonomy of theories of harm related to data.

I. DATA AS AN INPUT INTO PRODUCT DEVELOPMENT

The first concern that has been at the forefront of the antitrust analysis of data has been the importance of data as an input in product development. In the modern digital economy, data has emerged as a critical asset for businesses, often described as the "new oil" due to its value in creating competitive advantages.[4] From an antitrust perspective, one concern regarding data has been the potential for the accumulation and control of large datasets to entrench established firms with market power, giving them a competitive edge which ultimately might lead to higher prices or a lower quality product.

From an economic perspective, data can provide significant competitive advantages in several ways.[5] First, the process of collecting and processing large amounts of data often involves substantial fixed costs. As these costs are spread out over a growing customer base, the average cost per customer decreases. This means that new entrants in the market might need to operate with lower profits compared to established firms while they try to build their own customer base. The profitability advantage enjoyed by larger firms might allow them to refine their products, personalize services, and improve efficiency in ways that smaller firms or new entrants cannot easily replicate.[6] Second, network effects in data-driven markets may exacerbate the competitive importance of data. In many digital markets—for example, social media or online marketplaces—the value of a service

3 *Id.*

4 *See, e.g.*, *The world's most valuable resource is no longer oil, but data: The data economy demands a new approach to antitrust rules*, Economist (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

5 Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 Ariz. L. Rev. 339, 339-381 (2017), https://arizonalawreview.org/pdf/59-2/59arizlrev339.pdf; Andres V. Lerner, *The Role of 'Big Data' in Online Platform Competition* (Aug. 26, 2014), https://ssrn.com/abstract=2482780; *Data, Digital Markets and Refusal to Supply*, Ofcom economic discussion paper series, issue no. 6 (Dec. 7, 2022), https://www.ofcom.org.uk/__data/assets/pdf_file/0028/248950/Data,-Digital-Markets-and-Refusal-to-Supply.pdf.

6 *See, e.g.*, OECD Competition Committee, *Barriers to Entry,* Series Roundtables on Competition Policy, No. 58 (March 6, 2006), https://www.oecd.org/daf/competition/36344429.pdf.

increases as more people use it. In turn, the more consumers use a service, the larger the volume of data that is available to the service provider.

The interaction of these two effects can lead to a data-driven advantage which creates a "feedback loop" where already successful firms become even more successful—more data leads to better services, attracting more users, and generating even more data. In some cases, the fixed costs associated with data collection and processing can be so high and the network effects so substantial that they become a barrier to entry, making it difficult for new players to enter the market. This dynamic can create a winner-takes-all scenario, where once a firm gains a significant market share, it is difficult for others to compete effectively.[7]

Moderating the potential for anticompetitive harm is the fact that network effects and scale economies can be welfare improving, as large firms may offer a superior product at a lower price. As such, it is typically not the collection and analysis of large datasets that leads to anticompetitive harm but instead the leveraging of a dominant market position to disadvantage rivals. Absent such conduct, the potential pro-competitive effects arising from data collection can be significant. Additionally, the competitive advantages conferred by data do not mean that access to data is always necessary to develop competitive products.

Data, unlike many other resources, is non-rivalrous—its use by one firm does not preclude its use by another. This characteristic potentially allows for multiple firms to compete if they have access to the same or similar data sets. Data may also be fungible in that different data sources may be used to solve the same problem. For instance, financial technology firms using alternative data in lieu of traditional credit reports in their scoring models when underwriting loans saw significant growth in recent years.[8] Another moderating factor is that the value of data is not static but can depreciate rapidly. Today's valuable dataset might be obsolete tomorrow. Thus, the competitive advantages afforded by data might not be as insurmountable as they appear, especially in fast-moving sectors where innovation can quickly change the competitive landscape.

Ultimately, the focus should be on the ability to generate insights from data rather than on the data itself. New entrants with superior algorithms or analytical capabilities could outcompete incumbents, even with access to smaller or less comprehensive datasets. Also, diminishing returns to data collection might limit the potential advantages obtained by incumbent firms. Statistical precision increases with the square root of the sample size, meaning that in order to improve an estimate by a factor 10 it is necessary to increase the sample size by a factor of 100.[9] Similarly, machine learning algorithms frequently exhibit log-linear performance growth with respect to the number of samples used, meaning that

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7 *Id.* at 33.

8 Terri Bradford, *"Give Me Some Credit!": Using Alternative Data to Expand Credit Access*, Federal Reserve Bank of Kansas City, June 28, 2023, https://www.kansascityfed.org/Payments%20Systems%20Research%20Briefings/documents/9638/PaymentsSystemResearchBriefing23Bradford0628.pdf.

9 *See, e.g.*, Fumio Hayashi, ECONOMETRICS (Princeton University Press 2000).

exponentially more data is necessary to make modest improvements in accuracy.[10] As such, large gains can frequently come from improved algorithms rather than through more data.

Concerns about data's role as an input into product development have been central to the DOJ's theory of harm in the recent case it has brought against Google regarding Google's business practices in online search and search advertising.[11] The DOJ has alleged that Google, the world's leading search engine, has maintained and extended its market power in search and search advertising by striking exclusive agreements to be the default search engine on a large portion of the major devices and services where users perform search. This includes mobile telephones, wireless carriers, and internet browsers. All told, the DOJ has alleged that Google's default search engine agreements cover nearly 60 percent of all searches performed in the U.S. with an additional 20 percent covered by Google owned-and-operated properties like Chrome browser.[12]

While the DOJ has alleged that this has directly foreclosed competing search engines by steering default search engine traffic to Google, the DOJ has also theorized a dynamic effect due to the data Google has been able to harvest from its search engine users and that its rivals have been denied. The theory is that search queries create data, which can be used to improve search engine results, which drives further users to the search engine, creating even more data and leading to a strong product quality feedback cycle. As stated by the DOJ in its opening statement in the trial, data is "oxygen for a search engine" and the exclusive agreements Google has struck amounted to a "data fortress" that competitors cannot break through.[13]

Google, on the other hand, has argued that data is not nearly as central to search quality and that its marginal value to Google's search algorithms diminishes with scale, implying that other competitors can create competing search engines with much lower volumes of data.[14] As noted by Google's Chief Economist in a 2009 interview, "it's not the quantity or quality of the ingredients that make a difference, it's the recipes."[15] Despite these arguments, the court ruled in August 2024 that Google had violated Section 2 of the Sherman Act and that the use of these exclusive agreements "prevented rivals from accumulating the queries and associated data, or scale, to effectively compete." In September 2025, the court ordered Google to share "certain search index and user-

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10 *See, e.g.*, Hal Varian, *Artificial intelligence, economics, and industrial organization, in* The Economics of Artificial Intelligence: An Agenda 399 (Nat'l Bureau of Econ. Res. Conf. Rep. Series, University of Chicago Press 2019); Vishaal Udandarao et al., *No "Zero-Shot" Without Exponential Data: Pretraining Concept Frequency Determines Multimodal Model Performance* (April 4, 2024), https://arxiv.org/abs/2404.04125.

11 Complaint, *U.S. Dep't of Justice v. Google LLC*, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download.

12 *Id*.

13 Steve Lohr, *A Key Question in Google's Trial: How Formidable Is Its Data Advantage?* N.Y. Times, Sept. 18, 2023, https://www.nytimes.com/2023/09/18/business/google-antitrust-trial-data.html.

14 Defendant Google LLC's Pre-Trial Brief (Redacted), *U.S. Dep't of Justice v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. Sept. 8, 2023).

15 Tom Krazit, *Google's Varian: Search scale is 'bogus,'* CNET (Aug. 14, 2009), https://www.cnet.com/culture/googles-varian-search-scale-is-bogus/.

interaction data" with competitors as part of a remedy.[16] Additionally, the Court also discussed the rapid rise of generative AI ("GenAI") during the period between the liability trial and the remedies hearing, emphasizing the "nascent competitive threat" that GenAI products pose to general search engines. This discussion reinforces the notion that innovation can quickly reshape the competitive landscape and diminish advantages derived from data.

The lawsuit brought by the FTC against Amazon in September 2023 is relevant to the proposition described above that the collection of consumer data can lead to network effects and economies of scale but might not alone constitute harm to competition.[17] Instead, harm to competition might arise if a firm leverages its comparative advantage to prevent competitors from achieving the necessary scale to compete effectively. The FTC claims that access to shopper data is one of the sources of network effects for "online superstores" like Amazon.[18] The complaint alleges that online superstores use data to personalize their users' shopping experiences, and that as an online superstore gains more scale, this effect becomes more powerful.[19] Thus, despite the obvious benefits that personalization and tailored shopping experiences bring to consumers, the FTC alleges that data serves as a barrier to entry since "[p]rospective entrants would have to acquire a sufficient shopper base to obtain enough data to offer this level of personalization."[20]

The FTC contends that Amazon's access to considerable amounts of consumer data allows it to personalize the shopping experience of its customers and to offer a service that is unmatched by competitors not able to achieve the requisite scale. Because these competitors cannot offer a comparable shopping experience, they would normally attempt to compete with Amazon through lower prices. That is, when consumers care about the price and quality of their shopping experience, and competing marketplaces cannot offer a similar quality experience, then these competitors must offer lower prices to attract customers. This strategy would allow them to start building a consumer base and eventually allow them to offer a service of comparable quality. Thus, over time competition would tend to increase the quality of the shopping experience and lead to lower prices.

However, the FTC has alleged that Amazon's contracts and algorithms preclude vendors from selling at lower prices on competing online marketplaces, in turn foreclosing a key avenue of competition that could be used by other firms to obtain scale. As such, the alleged harm to competition does not arise from Amazon's data collection. Rather, data create an alleged barrier to entry that competitors need to overcome in order to succeed, but Amazon's efforts to prevent vendors from offering lower prices on other platforms deprived competitors of the ability to do so.

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16 Memorandum Opinion, *United States of America et al. v. Google LLC*, No. 20-cv-3010 (APM) (D.D.C. Sep. 2, 2025)

17 Complaint (Redacted), *Federal Trade Commission v. Amazon.com, Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1910134amazonecommercecomplaintrevisedredactions.pdf.

18 *Id.* at ¶ 180.

19 *Id.* at ¶ 180.

20 *Id.* at ¶ 180.

Importantly, not all barriers to entry and expansion are due to economies of scale and network effects. The data generated by consumers when using a firm's product or service may also be leveraged by the firm to increase switching costs and create customer lock-in. In situations where the data are not fungible, the firm may hinder portability or restrict the access of other firms to key data in order to stifle competition. Consider, for instance, the allegations in the recent class action lawsuit Gamboa v. Apple.[21] In this case, the plaintiffs alleged that Apple "leveraged its power in the mobile device markets to exclude competition in the market for Full-Service Cloud Storage."

Specifically, the plaintiffs alleged that Apple prevented third-party cloud storage competitors from accessing "Restricted Files" associated with device settings, apps, and app data, which had the effect of limiting a customer's ability to back up their mobile device on third-party cloud storage platform. According to the plaintiffs, this restriction in effect created an illegal tying arrangement where a customer with an Apple mobile device needed to purchase Apple's cloud storage option, iCloud, if they wanted access to Full-Service Cloud Storage. The complaint further asserts that because customers placed a high value on full-service functionality, the ultimate impact was to foreclose competition and that "consumer choice is gravely diminished." The case is still ongoing, with the Court recently denying Apple's motion to dismiss in June 2025, stating that "Plaintiff's plausibly allege their monopoly claim . . . based on allegations of tying."[22] This lawsuit underscores the potential for consumer data to be used to increase switching costs and insulate a dominant firm from competitive pressures.

The highlighted cases underscore the role of data in digital market competition and highlight the complex interplay between data control, market power, and antitrust enforcement in a rapidly evolving digital landscape.

II. ANTICOMPETITIVE MISUSE OF PERSONAL DATA

Another competitive concern that has been cited in recent antitrust enforcement is that, similarly to how market power can be exercised by firms to increase prices, market power may also be leveraged to force greater disclosure of personal information from consumers.[23] On top of that, whether a firm has extracted "too much" data is unclear. The economic literature has not formed a consensus on how to systematically assess optimal privacy. The balance between consumer privacy and information sharing between consumers and firms is not generally defined. Consumer privacy differs from typical economic goods as its value is often context dependent, privacy sensitivities and preferences vary by individual, and because what constitutes sensitive information differs

21 Second Amended Class Action Complaint, *Gamboa v. Apple, Inc.*, No. 5:24-cv-01270-EKL (N.D. Cali. Mar. 21, 2025)

22 Order Denying Motion to Dismiss the Second Amended Complaint, *Gamboa v. Apple, Inc.*, No. 5:24-cv-01270-EKL (N.D. Cali. June. 16, 2025)

23 *See, e.g.*, Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 Yale J. Reg. 401 (2014), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8199/14_31YaleJonReg401_2014_.pdf?sequence=2&isAllowed=y; Frank Pasqual, *Privacy, Antitrust, and Power*, 20 Geo. Mason L. Rev. 1009 (2013), https://heinonline.org/HOL/Page?handle=hein.journals/gmlr20&div=37&g_sent=1&casa_token=&collection=journals.

across individuals.[24] Because data is non-rivalrous, the socially optimal level of consumer privacy might be higher than what is individually optimal for consumers.[25] Non-rivalry means that the value of data is not diminished when it is used by multiple firms, and thus sharing data broadly across firms might lead to large social gains, if at the cost of a reduction in the privacy enjoyed by individual consumers. Moreover, situations where sharing personal information can reveal information about other individuals might result in excessive data sharing compared to the social optimum.[26]

The protection of consumer privacy has historically fallen outside the scope of antitrust enforcement, which traditionally has focused on conduct that resulted in higher prices, lower output, or lower quality for consumers, and instead fell under the mandate of consumer protection agencies. However, with the rise of the digital economy, the distinction between antitrust and consumer protection has been blurred. Firms are not only able to collect, store, and analyze consumer data on an unprecedented scale to inform internal business decisions, but they can also commercialize data for purposes that may or may not be aligned with the interests of consumers. The use of behavioral marketing in digital advertising has become more ubiquitous, fueled by the availability of consumer data on the background and preferences of consumers.[27]

The revenue generated by digital advertising has allowed firms to provide many digital services to consumers at no monetary cost, such as social media and music streaming. While this business model has the potential to generate high levels of consumer surplus, one concern is that personal data has become a resource that can be monetized, reducing the overall level of consumer privacy afforded to consumers. The theory is that consumers, often unknowingly or without viable alternatives, pay for the services with their personal information, which becomes less protected and more susceptible to misuse when a firm with market power can set the terms of user engagement.

However, it must be noted that such business models can generate substantial benefits for consumers. The collection and analysis of consumer data can drive innovation. This data enables firms to improve existing products, develop new services, and tailor offerings to individual user preferences. Moreover, the business model of providing digital services for free, funded by advertising that relies on consumer data, is an arrangement that allows a broader section of the population to access these services.

A concern about the anticompetitive misuse of personal data was expressed in the FTC's recent lawsuit against Facebook's parent company, Meta. Facebook operates a two-sided platform where consumers have access to social networking services for free. On the

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24 Alessandro Acquisti, Curtis Taylor, & Liad Wagman, 54 *The Economics of Privacy*, J. of Econ. Literature 442, 446 (2016). *See also*, Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 Geo. Wash. L. Rev.1 (2021).

25 Charles I. Jones & Christopher Tonetti, *Nonrivalry and the Economics of Data*, 110 Am. Econ. Rev. 2819 (2020).

26 Daron Acemoglu et al., *Too much data: Prices and inefficiencies in data markets*, 14 Am. Econ. J.: Microeconomics 218 (2022).

27 *See, e.g.*, OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Consumer data rights and competition–Note by the United States* (June 12, 2020), https://www.justice.gov/atr/page/file/1316691/dl?inline.

other side of the platform, Facebook monetizes its product through "social advertising," a type of digital marketing that allows businesses to deliver personalized advertisements to consumers. Central to this business model is Facebook's collection and distribution of data via its API systems. In this lawsuit, the FTC has alleged that Facebook has conditioned access to its API systems to anticompetitively exclude rival personal social networking providers and has unlawfully maintained a monopoly in personal social networking.[28] Facebook earns a considerable share of its revenue by allowing businesses to place personalized advertisements on its platforms, and the FTC has alleged that Facebook has harmed competition and consumers in a market for social advertising. In addition, the FTC has alleged harm directly to the users of its social networking service: "Facebook has been able to provide lower levels of service quality on privacy and data protection than it would have to provide in a competitive market."[29] Specifically, the FTC has alleged that Facebook excluded nascent competitors, preventing them from becoming competitive constraints that would have resulted in a better level of service offered to users, including through improved "availability, quality, and variety of data protection privacy options for users, including, but not limited to, options regarding data gathering and data usage practices."[30] While the case is still ongoing, it showcases the FTC's concern with the way in which competition may impact firms' policies toward the protection of user privacy.

Two acquisitions by Amazon have similarly been under scrutiny for concerns related to the potential use of sensitive consumer data. U.S. Senator Elizabeth Warren and five U.S. Representatives petitioned the FTC to oppose Amazon's proposed acquisition of iRobot, a smart vacuum manufacturer, citing "Amazon's record of infringing on consumers' privacy" and concerns with Amazon's "growing surveillance powers" associated with iRobot's mapping technology.[31] While the FTC has not publicly released the details of its investigation into the iRobot deal, the Competition and Markets Authority ("CMA") investigated the privacy implications of the deal, and Amazon's potential ability to collect and combine various sources of consumer data, as one potential area of concern.[32]

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28 First Amended Complaint for Injunctive and Other Equitable Relief (Redacted), *Federal Trade Commission v. Facebook, Inc.*, No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

29 *Id.* at ¶ 221.

30 *Id.* at ¶ 220.

31 Letter from Senator Elizabeth Warren et al. to the Honorable Lina Khan, Chair, Federal Trade Commission (Sept. 28, 2022), https://www.warren.senate.gov/imo/media/doc/Letter%20to%20FTC%20on%20Amazon%20-%20iRobot%20Merger.pdf.

32 While the CMA cleared the deal, the European Commission objected to the proposed acquisitions. In January 2024, Amazon and iRobot announced that they agreed to terminate the pending acquisition, before the FTC could not conclude its investigation. *See* Competition & Markets Authority, *Anticipated acquisition by Amazon.com, Inc of iRobot Corporation: Decision on relevant merger situation and substantial lessening of competition*, ME/7012/22 (June 16, 2023), https://assets.publishing.service.gov.uk/media/64be31862059dc000d5d2851/Amazon_iRobot_decision_-_NON-CONFIDENTIAL_-_FOR_PUBLICATION.pdf; European Commission, *Commission sends Amazon Statement of Objections over proposed acquisition of iRobot* (Nov. 27, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990; Press Release, iRobot, Amazon and iRobot agree to terminate pending acquisition (Jan. 29, 2024), https://media.irobot.com/2024-01-29-Amazon-and-iRobot-agree-to-terminate-pending-acquisition.

Similar concerns were raised with respect to Amazon's acquisition of One Medical, a membership-based primary care provider. After the acquisition was completed, the parties released a statement assuring that "nothing about this acquisition changes Amazon or One Medical's commitment to privacy or the strong protections we have for Protected Health Information"[33] However, while certain individual health information is protected by HIPAA, the law does not preclude the use of anonymized, aggregated data or of data that consumers agree to share with third parties. While the use of such data could improve consumer welfare by allowing Amazon to further tailor its product offerings to the specific needs of its customers, the FTC expressed concerns with respect to how the merging parties would handle potentially sensitive consumer information. While the FTC ultimately did not challenge the acquisition, it released a joint statement stating that "the parties and the market more broadly should be on notice that the Commission will continue to monitor this space and bring enforcement actions whenever the facts warrant."[34] Again, these investigations demonstrate the increasing focus of enforcement agencies on privacy and the use of sensitive consumer data as a potential avenue of consumer harm.

III. ACCESS TO COMPETITIVELY SENSITITIVE DATA TO UNFAIRLY DISADVANTAGE RIVALS

Still another competitive concern regarding data pertains to situations where one company may gain access to a large amount of sensitive data on competitors' operations, for instance through their importance as a service provider to other competitors in the industry or through a third-party provider. The concern is that access to competitively sensitive information may lead to reduced competitive constraints in an industry, either by increasing the ability of a firm to disadvantage its rivals or by increasing the likelihood of coordinated effects.

For example, FTC Chair Lina Khan indicated such concerns about Amazon, arguing that Amazon has used data on its third-party sellers' sales on Amazon's marketplace to "unfairly" compete with these sellers.[35] This includes identifying popular third-party products and launching competing versions of these products under its private label, which Chair Khan claims allows Amazon to increase sales without incurring the risk incumbent third-party sellers face when launching a product. [36] Chair Khan argues that Amazon can engage in such actions because of its dominance as a sales platform that third-party sellers must access even though they may have concerns with respect to Amazon's use of their

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33 *One Medical Joins Amazon to Make It Easier for People to Get and Stay Healthier*, One Medical (Feb. 22, 2023), https://www.onemedical.com/mediacenter/one-medical-joins-amazon/. *See also*, Rebecca Klar, *Klobuchar asks FTC to investigate Amazon's $3.9 billion move to acquire One Medical*, The Hill (July 22, 2022), https://thehill.com/policy/technology/3570452-klobuchar-asks-ftc-to-investigate-amazons-3-9-billion-move-to-acquire-one-medical/.

34 *Joint Statement of Chair Khan, Commissioner Slaughter, Commissioner Wilson, and Commissioner Bedoya Regarding Amazon.com, Inc.'s Acquisition of 1Life Healthcare, Inc.*, U.S. Federal Trade Commission (Feb. 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210191amazononemedicalkhanslaughterwilsonbedoya.pdf.

35 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 710-805 (2017), https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

36 *Id*. at 780-783.

data.[37] However, as acknowledged by Chair Kahn in her academic work, these practices are not limited to Amazon, and brick-and-mortar retailers have also used similar data, including other brands' sales records, to introduce private labels.[38]

The potential for the sharing of competitively sensitive information leading to coordinated effects was a key argument advanced in the FTC's recent complaint against Agri Stats in September 2023.[39] Agri Stats aggregates and distributes operational data from the largest meat producers in the United States, including aggregate information on prices, wages, costs, inventories, and production plans. In its complaint, the FTC has alleged that "Agri Stats operates an information-sharing scheme that allows processors to exchange competitively sensitive information about their operations and sales that is comprehensive, granular, current, and available exclusively to processors"[40] and that "[w]ith Agri Stats' encouragement and facilitation, Agri Stats' processor subscribers use the information collected and distributed by Agri Stats to increase and stabilize prices and reduce the supply of meat."[41]

Economic theory suggests that firms may be more likely to sustain collusive behavior if deviations from the supra-competitive price can be readily identified and punished. If deviations were difficult to discern, the firms may have an incentive to charge a price below their competitors to gain additional business and higher gross profits. The FTC has alleged that by sharing competitively sensitive information, "Agri Stats reduces common challenges to coordination—distrust among competitors, and 'cheating' on agreements."[42] Of course, informational exchanges can also have procompetitive effects, such as allowing companies to benchmark their performance to increase efficiency, reduce costs, or improve demand forecasting.[43] Nevertheless, this case demonstrates how regulatory agencies continue to scrutinize whether the sharing of potentially competitively sensitive information may harm competition in a broad sense, rather than having a narrow focus on cases in which specific competitors were disadvantaged.

Similar concerns were echoed in recent cases involving algorithmic collusion. For example, in its complaint against RealPage, the DOJ alleged that the company's algorithmic rent-setting software exploited sensitive data provided by subscribing landlords to coordinate and maximize rent prices.[44] Economic theory suggests that the

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37 *Id.* at 780-783. Interestingly, these concerns are not reflected in the lawsuit brought by the FTC against Amazon in September 2023. *See* Complaint [Public Redacted Version], *Federal Trade Commission v. Amazon.com, Inc.,* No. 2:23-cv-01495-JHC (W.D. Wash. Nov. 2, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1910134amazonecommercecomplaintrevisedredactions.pdf.

38 Khan, *supra* note 32, at 782.

39 Complaint, *U.S. Dep't of Justice v. Agri Stats, Inc.,* No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023), https://www.justice.gov/d9/2023-10/416782.pdf.

40 *Id.* at 16.

41 *Id.* at 51.

42 *Id.* at 19.

43 OECD Competition Committee, *Information Exchanges between Competitors under Competition Law*, Series Roundtables on Competition Policy, No. 115 (2010), https://www.oecd.org/daf/competition/48379006.pdf.

44 Complaint, *U.S. Dep't of Justice v. RealPage*, Inc, No. 1:24-cv-00710 (M.D.N.C. Aug. 23, 2024), https://www.justice.gov/archives/opa/media/1383316/dl?inline.

use of pricing algorithms can lead to procompetitive outcomes, such as prices that are more responsive to market conditions and a more efficient allocation of resources. The DOJ's allegations center around whether RealPage's software collects and analyzes non-public pricing data, such as rental applications, executed new leases, renewal offers and acceptances, and forward-looking occupancy information, to generate recommendations for rental prices which in effect allowed competing landlords to coordinate their rental prices.[45] This competitively sensitive information is alleged to be more granular, timely, and comprehensive than alternatives available to potential renters or competitors that do not subscribe to RealPage's services.[46]

According to the DOJ, "[c]ompetitively sensitive data collected from competing landlords is a critical input to RealPage's revenue management software" and "[n]o other revenue management company can match RealPage's access to landlords' nonpublic, competitively sensitive rental data."[47] These allegations raise fundamental questions about balancing the pro-competitive benefits of algorithmic pricing with the need to safeguard competition by preventing the sharing of competitively sensitive information. They also challenge the definition of what constitutes competitively sensitive data and whether the availability of modern data analysis tools can blur the lines between legitimate market strategies and anti-competitive behavior. As stakeholders in the housing market grapple with these developments, it is crucial to scrutinize how algorithmic pricing tools can be designed to support fair competition without facilitating collusion.

There are procompetitive reasons for industry leaders to also serve as platforms and service providers even if it can lead to the exchange of competitively sensitive information. There may be synergies that drive industry-specific solutions to be developed by industry participants, instead of third parties not involved in the industry. For example, Visa, the payment card company, was founded by Bank of America as an internal credit card product and was later licensed by Bank of America to other banks once the system proved successful internally. In other words, it is not surprising that an industry solution would be developed by a current industry participant. There also may be economies of scale that drive an industry to a centralized solution, even if it involves access to competitively sensitive information. For example, in the case of Amazon, there are clear efficiencies to centralizing the functions of building an e-commerce website. These efficiencies can ultimately benefit consumers through an expansion in the variety of available products and through a reduction in price. Moreover, the fear of appropriation of competitively sensitive data can be mitigated by the use of firewalls, which are common in many industries.[48]

The question of whether a firm's access to a competitor's data will give the firm an unfair advantage might also be affected by the competitive constraints faced by the firm. If

45 *Id.* at 5, 15, 75.

46 *Id.* at 17.

47 *Id.* at 11, 15.

48 For example, firewalls are commonly employed in investment banks between the brokerage and corporate advisory businesses so that insider information about corporate advice is not used to advantage the bank's brokerage clients. Likewise, in government procurement, firewalls are often put in place so that a firm that already has a contract with a government is not unfairly advantaged in subsequent bids for new contracts.

there are multiple companies competing to provide the same service, then the firm would likely have an incentive to implement safeguards for consumer data or firewalls or come to other agreements regarding the access to competitively sensitive data.

This dynamic featured prominently in the FTC's action to block the proposed acquisition of Aerojet Rocketdyne ("Aerojet") by defense contractor Lockheed Martin.[49] Aerojet is one of two companies supplying solid rocket motors ("SRM") to major defense contractors (also known as primes) such as Lockheed Martin and may supply these parts to multiple primes competing for the same opportunity. As such, Aerojet allegedly has access to competitively sensitive information from various prime contractors about their system designs. An important feature of this market underlying the FTC's theory of harm was the limited supply of SRM manufacturers, which was perceived to lessen the incentive to safeguard the competitively sensitive information. In challenging the transaction, the FTC alleged that the deal "heightens the incentives for Lockheed to misuse . . . competitively sensitive, non-public information of rival primes" in order to gain a competitive advantage for a given proposal.

Further, the FTC has alleged that Lockheed Martin, being one of the largest purchasers of SRMs, would "be privy to competitively sensitive, non-public information relating to Aerojet's only SRM rival, Northrop [Grumman]" and would be able to use this information to advantage its newly acquired SRM business. In its complaint, the FTC asserted that "[p]reventing such potential anticompetitive exchanges of information is necessary to maintain effective competition in the Relevant Markets to ensure that innovation, price, and/or performance for these important U.S. military systems is not negatively impacted." Facing resistance from the FTC, the parties eventually decided to abandon the transaction. This case demonstrates that the FTC not only considered the potential for a vertically integrated company to use an informational advantage to lessen downstream competitive constraints, but also using said information to advantage its upstream business.

The DOJ recently raised similar concerns in its challenge to the merger of UnitedHealth Group ("UHG") and Change Healthcare ("Change").[50] UHG, the largest health insurer in the United States, proposed to acquire Change, a health technology company used by a large share of health insurers and healthcare providers primarily in the processing of healthcare claims. UHG also had a smaller presence in claims processing as part of its Optum business. The DOJ in its complaint alleged that the merger would allow UHG to access rivals' claims data via their business with Change, which would allow UHG to "slow its rivals' innovations, reverse-engineer its rivals' proprietary plan and payment rules, preempt their competitive strategies, and compete less vigorously for certain customers," which "would prove profitable to United while harming competition."[51]

49 Complaint (Redacted), *In re Lockheed Martin Corp. and Aerojet Rocketdyne Holdings, Inc.*, No. 9405 (F.T.C. Jan. 25, 2022), https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf.

50 Complaint, *U.S. Dep't of Justice v. UnitedHealth Group Incorporated*, No. 1:22-cv-00481 (D.D.C. Feb. 24, 2022), https://www.justice.gov/media/1208936/dl?inline.

51 *Id.* at ¶ 12.

The court reasoned, however, that UHG through Optum already had access to much of the competitively sensitive information that the government sought to prevent UHG from gaining access to as part of the deal and that the government did not provide any evidence as to what the incremental value of the additional data that UHG would have access to via the Change acquisition.[52] Moreover, the court found that UHG's Optum subsidiary has strong incentives to protect its customers' data since those customers expect that their data will be kept out of the hands of UHG's insurance business. In fact, UHG already has a system of firewalls in place to protect Optum's data from being used by UHG's insurance business. The court found that the government put forward no argument as to why these incentives would change with the Change acquisition. The court's finding in the challenge of the UHG/Change merger highlighted the importance of real-world evidence in examining whether a theory of harm centered around data sharing is plausible. As the court noted, "antitrust theory and speculation cannot trump facts."[53]

The DOJ's recent suit against Google for monopolization of multiple online advertising technology products also raises antitrust concerns about alleged access to competitively sensitive information.[54] In this case, the DOJ has alleged that Google has used its market power in the provision of publisher ad servers to harness a trove of historical information on the bids publishers received for their ad inventory to create a proprietary algorithm called "Smart Bidding" that would predict the bids publishers would receive for their future ad inventory. Using this algorithm, the DOJ claims that Google would gain an "insider" advantage in the auction for publishers' ad inventory.[55]

In its April 2025 ruling, the Court held that Google was liable for both monopolization and tying. In their opinion, the judge specifically cited the "increasingly detailed knowledge about the billions of people who have used its products, including by collecting data pertaining to their web browsing, search activity, physical location, demographic characteristics, app usage, communications, shopping activity, and device and network information" that Google has collected over the past two decades as giving it a "data advantage" over its competitors.[56] This decision is one of the first explicitly mentioning data as a source of competitive advantage, and it could pave the way for changes in how tech companies operate and how they handle user data moving forward.

IV. CONCLUSION

In this era of digital proliferation, data has not only become more ubiquitous but also potentially more valuable. This surge in data availability, while largely beneficial for consumers, also has raised concerns with the antitrust agencies about its potential for reinforcing market positions and for creating new avenues for consumer detriment. The

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52 Memorandum Opinion, *United States of America v. UnitedHealth Group*, No. 1:22-cv-00481-CJN (D.D.C. Sept. 21, 2022), https://www.justice.gov/d9/2023-08/415418.pdf, at 35-36.

53 *Id.* at 12, 33, 52.

54 Complaint, *United States of America v. Google LLC*, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023), https://www.justice.gov/atr/case-document/file/1566706/dl?inline.

55 *Id.* at ¶¶ 256-261.

56 *United States v. Google LLC*, No. 1:23-CV-108 (LMB/JFA), 2025 WL 1132012 (E.D. Va. Apr. 17, 2025).

contemporary antitrust narrative is increasingly dominated by three concerns about data: its importance to product development, the potential misuse of consumer data, and the unfair exploitation of competitively sensitive information. These concerns highlight a need for antitrust frameworks that balance the dual objectives of fostering innovation and safeguarding consumer interests against the backdrop of increasingly data-centric markets.

RECENT DEVELOPMENTS IN CLASS AND COLLECTIVE COMPETITION CLAIMS IN THE US AND UK

By Victoria L. Weatherford and Rachel H. Ofori[1]

Collective competition litigation[2] continues to evolve around the world, presenting novel issues for both claimants and defendants. Collective competition actions play a key role in the overall enforcement of antitrust claims due to their ability to combine many small claims, which otherwise would have been impossible or otherwise too costly to litigate individually. Collective actions also promote judicial economy and protect against conflicting judgments. In the United States, antitrust class actions are a well-established, commonly used litigation mechanism that allows multiple plaintiffs to jointly litigate antitrust claims. In the U.K., the Competition Appeal Tribunal (CAT) or the Tribunal has been in existence for only 20 years, and class or collective action proceedings for antitrust and competition claims have been generally litigated in the UK for fewer than 10 years.

Throughout the years, collective antitrust actions have addressed a wide range of harms caused by antitrust violations, ranging from monopolistic schemes and price-fixing to anticompetitive actions and market manipulation. These cases have resulted in significant settlements which have continued to increase over recent years, reflecting their importance in deterring anti-competitive behavior and compensating affected parties.

In this article, we highlight the key similarities and differences between the antitrust collective redress regimes in the U.S. and in the U.K., as the first collective action competition cases reach settlement and trials are expected to proceed in the UK in the coming years. We will discuss the current meaningful differences in class certification procedures, scope of discovery, litigation funding, settlement, and damages considerations.

THE BRIEF HISTORY OF ANTITRUST CLASS ACTIONS IN THE US

The history of antitrust class actions in the United States traces its origins to the late 19th and early 20th centuries, evolving significantly over time to become a key mechanism for maintaining competitive markets and addressing antitrust claims. The Sherman Antitrust Act of 1890 laid the groundwork, aiming to curb monopolistic practices and promote fair competition.[3] However, it was amendments set forth by the Clayton Antitrust Act of 1914 that granted parties the ability to sue for treble damages when harmed by conduct that violates antitrust laws.[4] The key provisions of the Clayton Antitrust Act specifically provide for the private enforcement of these laws.[5]

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2 Collective competition litigation and collective competition actions refer to antitrust class actions and other forms of collective litigation regarding anticompetition laws.

3 15 U.S.C. § 1-38.

4 15 U.S.C. § 12-27.

5 15 U.S.C. § 15.

The subsequent development of Rule 23 of the Federal Rules of Civil Procedure in 1938, and amendments to Rule 23 in 1968, were significant, as Rule 23 formalized the aggregation of numerous small claims in the American legal system. The adoption of Rule 23 was instrumental in amplifying the power of antitrust class actions, allowing groups of individual consumers and businesses to collectively challenge anti-competitive practices that would be otherwise economically unfeasible to pursue independently. [6] Today, almost all states have enacted class rules that mirror Rule 23 in state courts.

Pivotal antitrust collective action cases, such as *Illinois Brick Co. v. Illinois* (1977)[7] have further molded the landscape by addressing issues such as which parties have standing to bring actions under federal antitrust laws. In *Illinois Brick*, the state and local government entities sued concrete brick manufacturers for alleged anticompetitive behavior. The Supreme Court held that the state and local government entities did not have standing, however, because they had hired contractors, who hired sub-contractors, who purchased the bricks from the manufacturers. In this case, the Court made clear that indirect purchasers are not entitled to money damages under the Sherman Act but underscored the fact that groups of individual plaintiffs can combine competition claims if they meet standing requirements. While several states have since adopted antitrust rules that have modified the Court's ruling in *Illinois Brick*, antitrust class action cases following *Illinois Brick* have resulted in significant settlements and judgments, reflecting their importance in deterring anti-competitive behavior and compensating affected parties. The ongoing evolution of antitrust class action litigation continues to reflect broader economic and legal trends in the US, as US courts aim to balance robust enforcement of anti-competition laws with concerns about litigation abuse and efficiency.

THE BRIEF HISTORY OF ANTITRUST COLLECTIVE ACTIONS IN THE UK

The formalization of collective redress mechanisms in the United Kingdom has a notably shorter history. Due to the UK's common law principles, the UK judicial system had a historical preference for individual litigation over collective redress mechanisms. In the 1990s, the Lord Chancellor's Department issued a report titled *Access to Justice*,[8] which underscored the UK's need to adopt a formalized system where multiple individuals could aggregate claims in an efficient manner. Following this report, the UK adopted the Civil Procedure Rules, which included rules governing the main procedural mechanism for collective actions in UK, based on the Canadian model.[9]

From this, the first collective actions in the UK began in earnest in 2000, with the advent of the Group Litigation Order (GLO). GLOs allow multiple claims with common or related issues of fact or law to be managed together. GLOs typically function on an "opt-in" basis, meaning that claimants must take affirmative steps to join the action, and

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6 Fed. R. Civ. Proc. 23.

7 Ill. Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061 (1977).

8 https://webarchive.nationalarchives.gov.uk/ukgwa/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm.

9 CPR 19.1-CPR 19.15.

have been used in product liability, ESG, and other claims that cannot be heard in the (CAT Tribunal).

Despite being a noteworthy step towards providing individuals with a mechanism for collective redress for violations of UK anticompetition laws, GLOs did not fully embody the class action framework seen in the US, as they required each litigant to affirmatively choose to participate in the actions.

In an effort to provide greater protection to vulnerable consumers and deter anti-competitive behavior in an increasingly globalized economy, the UK adopted an opt-out regime in 2015, which specifically addressed violations of competition law the Consumer Rights Act of 2015.[10] Under this Act, the CAT was empowered to hear opt-out class actions for the first time, and grant Collective Proceeding Orders (CPOs), which enable claims on behalf of a defined class without the need for individual litigants to opt-in. This landmark development marked a substantial shift towards facilitating antitrust collective redress in the UK, and empowers the CAT with effectively sole authority over "opt-out" class actions.

Despite this significant shift in the law, few collective litigation cases were filed in the CAT between 2015 and 2020, until the UK Supreme Court on December 11, 2020 issued a landmark decision—and its first collective proceedings case of its kind to reach the Supreme Court—finding that the CAT incorrectly rejected an application for certification to bring collective proceedings in a case against a global credit card company, and setting out important principles and guidelines for collective action proceedings.[11]

The class representative in *Merricks* alleged that approximately 46.2 million consumers were defrauded as a result of certain 'interchange fees' charged to merchants between 1992 and 2008, and allegedly passed on to consumers. The CAT initially determined that the case was not appropriate for CPO classification because the claims did not lend themselves to an aggregate award of damages. The Supreme Court reversed and held that the CAT erred in denying CPO classification. The Supreme Court noted that the Tribunal applied an overly stringent standard in finding that aggregate damages could not be determined, and should have considered whether individual, separate proceedings were a reasonable alternative. The Supreme Court found that some difficulty in ascertaining individuals class members' losses or distributing damages was not an adequate reason to refuse CPO classification, and, not all class members need to have suffered some injury.

The test which the UK Supreme adopted in reaching this conclusion was that set out by the Canadian Supreme Court in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57:

> ". . . the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate

10 Consumer Rights Act 2015 c. 15.

11 Mastercard Incorporated & Ors v Walter Hugh Merricks CBE [2020] UKSC 51, available at /www.supremecourt.uk/cases/docs/uksc-2019-0118-judgment.pdf

> that it is common to the class . . . The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

The CAT shortly thereafter issued the UK's very first CPO on an "opt-out" basis in the same case, and in its decision reflected the principle that class certification is not an inquiry into the merits of a case but instead in an exercise in evaluating case management.[12]

Since the Tribunal's determination in *Merrick*, the number of CPO applications the Tribunal to the have rapidly increased.[13] Filings in the CAT have increased also as a result of the UK Supreme Court decision in *Lloyd v Google* [2021] UKSC 50. In *Lloyd*, the UK Supreme Court narrowed the circumstances in which it would permit group litigation procedures, when it refused in that case to permit collective proceedings where damages would need to be calculated on an individual basis and required a showing each plaintiff suffered a "material" damage separate and apart from the alleged violation of data protection rights.[14]

As a result, consumer protection cases that might have previously been filed under group litigation procedures are being filed as "opt-out" collective actions in the CAT under an "abuse of market dominance" theory. For example, representative plaintiffs are challenging a social media company's requirement that consumers agree to certain use of their data in order to access their free product. While the CAT initially refused to certify the claim for failing to meet the *Pro-Sys* test and expressed skepticism the case addressed harm to competition,[15] on a second look with the plaintiff providing a new expert report and a narrower claim the CAT permitted the claim to proceed as a collective action.[16] This is the approach the CAT has taken in other instances where the initial request for certification cannot be granted; to date *no* collective action proceedings have had a request for class certification decisively rejected.

CLASS CERTIFICATION

Today in the United States, FRCP 23 still governs the requirements for antitrust class action certification. FRCP Rule 23(a) provides that an action satisfy four conditions to qualify for class treatment: (i) the class must be so numerous that joinder of all members is impracticable (numerosity requirement), (ii) there must be questions or law or fact common to the class (commonality requirement), (iii) the claims of the representative parties must be typical of the claims of the class (typicality requirement), and (iv) the

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12 Walter Hugh Merricks CBE v Mastercard Incorporated & Ors [2021] CAT 28.

13 See Competition Appeal Tribunal, available at https://www.catribunal.org.uk/cases.

14 Available at: https://www.supremecourt.uk/cases/docs/uksc-2019-0213-judgment.pdf

15 Dr Liza Lovdahl Gormsen v Meta Platforms, Inc & Ors [2023] CAT 10, 1433/7/7/22, available at www.catribunal.org.uk/sites/cat/files/2023-02/2023.02.20%201433%20Gormsen%20v%20Meta_FINAL.pdf

16 *Id.* 1433/7/7/22, Collective Proceedings Order dated May 2, 2024, available at www.catribunal.org.uk/sites/cat/files/2024-05/14337722%20Dr%20Liza%20Lovdahl%20Gormsen%20v%20Meta%20Platforms%2C%20Inc.%20and%20Others%20-%20Order%20%28CPO%29%20%202%20May%202024.pdf

representative parties will fairly and adequately protect the interests of the class (adequacy of representation). [17] In general, numerosity has been established when the class contains at least 40 individuals, however, there are no set number of individuals required to certify a class.[18] Commonality in the antitrust context is relatively flexible, and a handful of common issues, or even one common issue between prospective class members may satisfy the requirement.[19] In order to determine typicality in the antitrust context, courts consider to what extent the prospective class members claims differ or are similar from those of other class members. For example, in *In re Carbon Black Antitrust Litigation*, a potential class member's claims were considered "typical" of that of other class members, even though the class member purchased the product at issue in different quantities or at different prices than other potential class members.[20] Finally, a class representative must "fairly and adequately protect the interests of the class."[21]

If a plaintiff meets all requirements under FRCP 23(a), a plaintiff must also meet one of the following three requirements under FRCP 23(b): (i) the litigation poses the risk of inconsistent judgments among class members or the risk that adjudication as to one plaintiff would be dispositive of the interests of an absent party; (ii) the litigation seeks primarily injunctive relief that would effectively resolve the claims of the class as a whole; or (iii) the litigation involves "questions of law or fact common to the class members," but does not fall into either of the first two categories.[22] With respect to the risk of inconsistent judgments, courts have declined class certification where there was an extremely low risk of other suits being filed and where the only foreseeable problematic effect of allowing the cases to proceed via individual claims is stare decisis.[23]

Antitrust class actions can also be initiated under Rule 23(b)(3) if questions of law or fact common to the members predominate and where a class action is the superior method of adjudication [24]. The Supreme Court has held that in order to determine if a class has fulfilled the predominance requirement, courts should take a "close look" at whether common questions predominate over individual ones to determine "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[25] Most antitrust plaintiffs seek certification under Rule 23(b)(3) because they can recover treble damages if they prevail on the merits after obtaining class certification under this subdivision. Finally,

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17 Fed. R. Civ. Proc. 23(a).

18 *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (stating that under FRCP 23(a), forty individuals likely satisfy the numerosity requirement.)

19 *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (stating that in order to satisfy the commonality requirement for purposes of FRCP 23(a)(2), even a single common question will do.)

20 See *In re Carbon Black Antitrust Litig.*, 2005 U.S. Dist. LEXIS 660 (D. Mass 2005).

21 Fed. R. Civ. P. 23(a)(4)

22 Fed. R. Civ. P. 23(b).

23 See *Klein v. Henry S. Miller Residential Servs., Inc.*, 94 F.R.D. 651, 666 (N.D. Tex. 1982)

24 See *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)

25 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615-16, 623-24 (1997)

plaintiffs in US antitrust class actions must also demonstrate that anticompetitive damages affected the entire prospective class. [26]

Notable for antitrust class actions, in April 2024 the US Supreme Court declined certiorari in a case out of the Eleventh Circuit presenting a circuit split on the issue of whether courts can grant certification of a class action by averaging of damages across the putative class and without regard to whether some class members may be uninjured.[27] The Supreme Court this year also declined certiorari in a case out of the D.C. Circuit, in which that Court "deem[ed] the proposed method through which plaintiffs intend to prove classwide antitrust impact to be 'colorable' and where it defers 'material factual dispute[s]' on classwide impact to the merits."[28] As a result, significant circuit splits remain among the courts of appeal regarding the thoroughness with which courts scrutinize antitrust impact models as well as the methodology plaintiffs may employ at certification to satisfy predominance for classwide damages.

In the UK, CPOs, CLOs and representative actions are the three main mechanisms for initiating antitrust collective actions. CPOs are the main collective redress option for claimants specifically alleging antitrust violations in the UK. In order to initiate a CPO, a class representative must apply to the Tribunal for certification. As a threshold matter, the CAT must determine whether the proposed class representative is a "just and reasonable" group or individual to represent the class of litigants.[29] While the class representative is not required to be a member of the class and is not required to have a personal claim against the proposed defendant, the Tribunal in examining this "authorization condition" will consider factors such as whether the proposed representative would fairly and adequately act in the interests of the class members and whether the proposed class representative has prepared a plan for the collective proceedings.[30] The authorization condition is not seen as particularly onerous, however the CAT has carefully scrutinized the terms of representative plaintiff litigation funding agreements and insurance terms, to ensure the proposed representative can fairly and adequately represent the interest of the class and also has adequate funds to pursue the litigation including the defendants' costs in the event the claim is unsuccessful.

If the class representative meets the CPO representative requirements, the class representative must then demonstrate to the CAT that the litigants seeking relief constitute an identifiable class.[31] In determining if the class meets the "eligibility condition," the Competition Appeal Tribunal Guide to Proceedings (the CAT guide) advises the Tribunal against certifying classes where the definitions are based on subjective or merits-based

26 *Comcast v. Behrend*, 133 S.Ct. 1426, 1433, 1435 (2013) ("Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." (internal quotation omitted)

27 Brinker International, Inc. v. Steinmetz, Docket No. 23-648.

28 National ATM Council, Inc. v. Visa Inc. (D.C. Cir., July 25, 2023, No. 21-7109) 2023 WL 4743013, at * 4, cert. denied sub nom. Visa Inc. v. Nat. ATM Council, Inc. (U.S., Apr. 15, 2024, No. 23-814) 2024 WL 1607963. [Back]

29 The Competition Appeal Tribunal Rules 2015, Rule 78(1)(b).

30 The Competition Appeal Tribunal Rules 2015, Rule 78(2).

31 The Competition Appeal Tribunal Rules 2015, Rule 79(1).

criteria or classes with overly broad definitions.[32] Next, claimants must prove to the Tribunal that the claims sought to be included in the collective proceeding raise common issues of fact or law.[33] The CAT guide notes that the assessment of some individual issues is not fatal to an application for a CPO and provides an example: "the determination of liability for an infringement may raise common issues of fact and law which justify a CPO, while causation and the quantification of any damages may not be common to the class. In such circumstances, the Tribunal may decide to approve collective proceedings in relation to only part of the claims." [34]

Finally, the claims sought to be added to the CPO must be "suitable" to be brought in collective proceedings. In making its suitability determination, CAT will look to several factors including whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues, costs and the benefits of continuing the collective proceedings, whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class, the size and the nature of the class, whether it is possible to determine in respect of any person whether that person is or is not a member of the class, whether the claims are suitable for an aggregate award of damages; and the availability of alternative dispute resolution and any other means of resolving the dispute.[35] A class representative seeking approval to bring opt-out proceedings must make submissions as to why that form of proceedings is more appropriate than opt-in proceedings.[36]

While far less common in the UK, claimants pursuing collective antitrust claims can join a CLO or initiate a representative proceeding.[37] CLOs are orders from the High Court, which allow for the aggregation of claims by multiple individuals that share common issues of fact or law. While there is no class representative in a GLO, the High Court will publish a Group Register that lists all the claims that are subject to the GLO, as rulings made pursuant to the GLO are binding on all claims mentioned in the Group Register. Notably, the High Court also has the authority to transfer proceedings that relate to violations of UK competition law to the CAT for adjudication.[38] Representative proceedings are similarly brought before the High Court under Civil Procedure Rule 19. For representative proceedings, class members must have the "same interest in a claim" in order to proceed.[39]

In general, because the US Federal Rules regarding class actions have been in existence much longer than the UK's Civil Procedure Rules and the Competition Appeal Tribunal Rules for CPOs, the UK has a far less established history of caselaw from which

32 Guide to Competition Appeal Tribunal Proceedings, 6.37.

33 The Competition Appeal Tribunal Rules 2015, Rule 79(1).

34 Guide to Competition Appeal Tribunal Proceedings, 6.37.

35 The Competition Appeal Tribunal Rules 2015, Rule 79(2).

36 Guide to Competition Appeal Tribunal Proceedings, 6.38.

37 CPR 19.

38 Section 16 Enterprise Act 2002 Regulations 2015 (SI 2015/1643).

39 See e.g., Lloyd v Google LLC [2019] EWCA Civ 1599 (02 October 2019) (holding that several million members of the class that Mr Lloyd had the "same interest' under CPR 19.6(1) and were identifiable.)

to draw conclusions. However, from the CAT decisions to date it is clear that US courts apply relatively more stringent standards in deciding whether to grant class certification compared to the UK.

SCOPE OF DISCOVERY / DISCLOSURE AND EXPERT USE

In general, the US class action regime permits extensive document and written discovery prior to the certification of a class under FRCP 23. In *Walmart v. Dukes*, the Supreme Court highlighted the need for lower courts to permit extensive discovery in the class action certification process. In reversing the Ninth Circuit's decision to grant certification to a class of employees alleging sex discrimination under Title VII of the Civil Rights Act of 1964, the Supreme Court stated that parties seeking certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. . . . sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[40]

Shortly after, the Supreme Court reaffirmed the need for "rigorous analysis" prior to class certification specifically with respect to antitrust cases.[41] In *Comcast v. Behrend*, the Court overruled the Third Circuit's decision to certify a class of respondent cable TV subscribers who brought a putative class action against Comcast, alleging that Comcast swapped services with competitors in violation of US antitrust laws.[42] The Supreme Court chastised the Third Circuit's "refus[al] to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination."[43]

In the US, experts are also often used by both plaintiffs and defendants in the class certification phase. Parties are permitted to use multiple experts including industry experts, foreign accountants, economists, and statisticians and may choose to have them for both testifying and consulting purposes. By way of an example, in the antitrust context, the use of a private consulting economist may be useful to show the unlawful impact of a defendant's alleged anticompetitive price increases and to help calculate damages.[44]

The UK takes a far more restrictive approach to disclosure procedures and the use of experts. Disclosure proceedings are not automatic, and disclosure only takes place at the direction of the Tribunal.[45] During the first case management conference, the CAT will make a circumscribed disclosure plan to determine if and what kind of disclosures the

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40 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51, 131 S. Ct. 2541, 2551 (2011) (internal quotation omitted).

41 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

42 *Id*.

43 *Id*

44 *See e.g.*, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 810 (7th Cir. 2012)

45 Guide to Competition Appeal Tribunal Proceedings, 5.86.

parties will make to each other.[46] In addition to these disclosures, claimants or potential claimants must make an application, supported by evidence, to the CAT if disclosure is sought before proceedings have started.[47]

In stark contrast to the US Supreme Court directives regarding pre-proceeding discovery, the CAT does not encourage disclosure requests as part of the CPO certification process.[48] The Guide to Proceedings specifically states that "The Tribunal is likely to order pre-action disclosure only of specific documents or a very limited category of documents, and it will be alert to reject any purely speculative disclosure requests."[49] For example, in an effort to truncate disclosure, the CAT permitted a class representative's limited orders for a defendant to produce a broad description of a specific part of the defendant's business that was relevant to the CPO claim, as opposed to extensive document production.[50] Plaintiffs may submit expert reports in aid of class certification. And while parties are allowed to retain and call their own experts, experts are considered as more neutral parties who have duties to the Tribunal, not the party that called them.[51] In the UK, the CAT may "hot-tub," or aggregate expert advice, to assist the Tribunal in understanding the expert evidence before it.[52]

In the antitrust context, US courts encourage free and extensive discovery, whereas the CAT aims to streamline and simply the disclosure process as much as possible. Because UK claimants are highly limited in their ability to conduct disclosure prior to certification or before proceedings before the tribunal, the CPO applicant must affirmative demonstrate that they meet the threshold requirements at the time of application.

LITIGATION FUNDING AND COSTS

In the US, litigation funding is lightly regulated. Ethics rules, state law, and bar association guidance place restrictions on litigation funding.[53] For example, in 2011 the New York Bar issued a formal opinion regarding various ethical issues that may arise when a lawyer represents a client who is a party to a nonrecourse litigation funding agreement.[54] The opinion warned that "lawyers should be aware that in certain circumstances, courts have found that nonrecourse litigation financing agreements violate usury laws," even where the financing companies "characterize non-recourse financing arrangements as a 'purchase' or 'assignment of the anticipated proceeds of the lawsuit (and therefore not

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46 The Competition Appeal Tribunal Rules 2015, Rule 60(2)(a).

47 The Competition Appeal Tribunal Rules 2015, Rule 62.

48 Guide to Competition Appeal Tribunal Proceedings 6.28.

49 Guide to Competition Appeal Tribunal Proceedings 5.89.

50 Ryder Limited and Another v MAN SE and Others, Case 1291/5/7/18 (T; see also the Tribunal's order made 19-20 September 2019 in Ryder Limited and Another v MAN SE and Others, Case 1291/5/7/18 (T).

51 Guide to Competition Appeal Tribunal Proceedings, 7.67.

52 CPR PD 35, para 11.

53 *See, e.g.* H.R. 1127, 119th Gen.; Vt. Stat. Ann. tit. 8, § 2251 et seq.; Ark. Code Ann .§ 4-57-109 et seq. Assemb., Second Reg. Sess. (Ind. 2016).

54 The Ass 'n of the Bar of the City of New York Comm. on Prof'I and Judicial Ethics, Formal Op. 2011-12 (June 2011), 2011 WL 6958790, at *2 (hereinafter NYC Ethics Opinion].

subject to usury laws). " The opinion also stated that "courts in other jurisdictions have invalidated certain financing arrangements under applicable champerty laws."[55] With respect to litigation costs, parties are generally responsible for their own costs associated with involvement in the class action. In class action settlements, plaintiffs seek approval of their attorney's fees typically as a percentage of the overall class recovery; however, there is no court oversight of third-party litigation funding arrangements and typically these agreements are not subject to disclosure in discovery.

In the UK, litigation funding is widespread and overall is lightly regulated. While there is a voluntary self-reporting regime governing litigation funding, there is no central authority that regulates it.[56] Third-party funding before the CAT is explicitly permitted in CPO proceedings, under the Competition Appeal Tribunal Rules 2015, Rule 113, although proposed class representatives must submit any litigation funding agreements to the Tribunal for approval. At present, every opt-out collective action case filed in the CAT is funded by third-party funders.

One area in which there is more stringent oversight is that in the UK, damages based awards (DBAs)—where the fees are a percentage of the recovery—are unenforceable by UK statute unless certain conditions are met.[57] On July 26, 2023, the UK Supreme Court on an appeal from the CAT held that litigation funding agreements (LFAs), which entitle funders to payment based on the amount of damages recovered, would be classified as impermissible DBAs.[58] The plaintiffs in this case were required to renegotiate the terms of their LFAs to remove the unlawful DBA provision. In March 2024, the UK government proposed legislation to overturn the *PACCAR* case and loosen the restrictions on DBAs, which remains pending.[59]

The recently published The Civil Justice Council's Final Report on litigation funding proposes a comprehensive overhaul of the regulatory framework governing third-party litigation funding in England and Wales, following the UK Supreme Court's *PACCAR* decision. It recommends replacing the current self-regulatory model with a light-touch statutory regime administered by the Lord Chancellor, with potential transfer to the Financial Conduct Authority after five years. Key reforms include mandatory capital adequacy, anti-money laundering compliance, and early disclosure of funding arrangements, alongside enhanced protections for consumers and parties in collective proceedings—such as independent legal advice and court approval of funding terms. The report rejects caps on funder returns but calls for transparency and fairness through judicial oversight. It also advocates for the consolidation of CFA and DBA regimes, codification of pure funding principles, regulation of crowdfunding, and the creation of an Access to

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55 *Id*. at 3.

56 See http://associati onoflitigationfunders.com/code-of-conduct/.

57 Courts and Legal Services Act 1990 (CLSA 1990), section 58AA; see also Damages-based Agreements Regulations 2013 (SI 2013/609).

58 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28 (PACCAR), available at: https://www.supremecourt.uk/cases/docs/uksc-2021-0078-judgment.pdf

59 Litigation Funding Agreements (Enforceability) Bill, available at: https://bills.parliament.uk/bills/3702.

Justice Fund financed by litigation profits. These reforms aim to balance access to justice, market integrity, and consumer protection within a unified legislative framework.[60]

Generally, in the UK legal system, the unsuccessful party is responsible for the successful party's reasonable costs, however the CPR rules clarify that the High Court or Tribunal may allocate cost by considering a number of factors, including whether a party has succeeded on part of its case.[61] If a collective redress action is classified as a GLO, costs common to the claimants are equally divided, with each being severally liable for their own share.[62] Claimants are responsible to any individual costs that relate to a particular claim.[63]

SETTLEMENT AND DAMAGES

In the US, when and if the parties arrive at a mutually resolution, antitrust class settlements are subject to court approval due to their ability to bind absent class members.[64] Courts have the discretion to deny settlements that they do not believe adequately compensate all class members, regardless of the settlement size. For example. In 2016, the Second Circuit denied a $7.25 billion settlement in an antitrust litigation between certain payment card companies and customers because, the Court held that the settlement improperly compensated some class members more than others.[65] With respect to damages, US federal law mandates that successful plaintiffs in private antirust class actions up may receive as much as treble damages, which means up to three times their a plaintiffs actual damages).[66] In some cases, plaintiffs may also be entitled to other monetary remedies such as attorneys fees and pre-judgment interest.[67] The US Department of Justice explained that" [t]rebling damages generally increases deterrence by compensating for the possibility that anticompetitive conduct will not be detected and prosecuted. Likewise, the possibility of winning multiple damages enhances plaintiffs' incentives to seek out and detect anticompetitive conduct and to bear the time, expense, and uncertainty of bringing suit."[68]

CPO settlements under the CAT regime similarly require the Tribunal's approval. The CAT must approve any collective settlement for certified opt-out proceedings and opt-in and opt-out proceedings that have yet to be certified.[69] For certified opt-

60 Civil Justice Council. (2025). Review of litigation funding: Final report. https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/

61 Id.

62 CPR 46.6

63 *Id.*

64 Fed. R. Civ. Proc. 23.

65 *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig*, 827 F3d 223, 233–234 (2d Cir 2016).

66 15 U.S.C. § 15(a). There are a limited number of exemptions from this general rule. *See, e.g.,* Export Trading Company Act § 306, 15 U.S.C. § 4016(b)(1) (limiting antitrust claim recovery to single damages against export trading companies).

67 *Id.*

68 US DOJ, Competition And Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act: Chapter 9

69 Guide to Competition Appeal Tribunal Proceedings 6.94 - 6.101.

out proceedings, the CAT will consider if the proposed settlement terms are 'just and reasonable', having regard to a number of factors including: the amount and terms of settlement; the likelihood of a higher amount being awarded at trial; and the likely cost and duration of trial. Damages resulting from CPOs are more limited in scope. The Guide to Proceedings under the CAT provides that the Tribunal "may not award exemplary damages in collective proceedings . . . [d]amages awards will usually be limited to the loss suffered, including interest if appropriate."[70]

As of mid-2025, the CAT has approved five class action settlements under its collective proceedings regime. On December 6, 2023, the first approved partial settlement was part of an opt-out claim made by class representative Mark McLaren about delivery charges for new motor vehicles, in a follow-on case after a 2018 European Commission found that defendant companies had infringed competition law and manipulated prices. The settlement was with Compañia Sudamericana de Vapores (CSAV), one of twelve defendants in that case, for £1.2 million in damages and £380,000 in costs.[71]

The second CAT approved settlement occurred on May 10, 2024, approving a £25 million settlement between class representative Justin Gutman and Defendant Stagecoach South Western Trains Limited ("Stagecoach"), in one of several abuse of dominance cases alleging passengers were over-charged for certain train tickets.[72] Class members will have six months to submit claims for payment, and class action practitioners are carefully watching this and other cases in the CAT to see how the tribunal will evaluate class settlements. Most notably, on May 20, 2025, the CAT approved its largest-ever opt-out class action settlement: a £200 million agreement in *Merricks v. Mastercard*. This landmark case, which began in 2019, set new standards for evaluating collective settlements, including a three-tier "waterfall" distribution model prioritizing consumer compensation over funder profits.[73]

The approval of antitrust class settlements in the US can be an arduous process that ultimately may prevent the resolution of antitrust claims. Because FRCP 23(e) requires courts to ensure settlements are "fair, reasonable and adequate," a US court may deny seemingly adequate settlements if the settlement unfairly compensates certain class members relative to others. On the other hand, damages resulting from settlements in the

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70 Guide to Competition Appeal Tribunal Proceedings 6.77.

71 Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd and Ors, 1339/7/7/20, 6 December 2023, available at: https://www.catribunal.org.uk/sites/cat/files/2023-12/13397720%20Mark%20McLaren%20Class%20Representative%20Limited%20v%20MOL%20%28Europe%20Africa%29%20Ltd%20and%20Others%20-%20Order%20of%20the%20Chair%20%28Collective%20Settlement%20Approval%20Order%29%20%206%20Dec%202023.pdf

72 [2024] CAT 32, Justin Gutmann v First Mtr South Western Trains Ltd and Another, 1304/7/7/19, 10 May 2024, available at: https://www.catribunal.org.uk/sites/cat/files/2024-05/13047719%20Justin%20Gutmann%20v%20First%20MTR%20South%20Western%20Trains%20Limited%20and%20Another%20-%20Order%20of%20the%20Chair%20%28Collective%20Settlement%20Approval%20Order%29%20%2010%20May%202024_0.pdf

73 Walter Hugh Merricks CBE v Mastercard Incorporated and Others [2025] CAT 28 (20 May 2025), Competition Appeal Tribunal. Available at: https://www.catribunal.org.uk/sites/cat/files/2025-05/12667716%20Walter%20Hugh%20Merricks%20CBE%20v%20Mastercard%20Incorporated%20and%20Others%20-%20non%20confidential%20Judgment%20%28CSAO%20Application%29%20%2020%20May%202025.pdf.

US may provide aggrieved class members with more options for monetary remedies, as damages from UK collective actions are generally more limited.

CURRENT TRENDS IN ANTITRUST CLASS ACTIONS AND COLLECTIVE ACTIONS

In the United States, the Trump administration has brought with it an overall decline of federal antitrust enforcement. The average annual rate of merger antitrust challenges by the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) has declined by 20 percent when compared to prior administrations.[74] In general, there has been less enforcement against anticompetitive agreements and significantly less individuals convicted of Sherman Act Section 1 crimes.[75] This overall decrease in federal antitrust actions may prompt state attorneys generals and private plaintiffs to fill in the gaps.

In the UK collective actions landscape, several recent CAT decisions have illustrated the posture that the Tribunal may take in future cases, particularly with respect to collective action certification. For example, in *Riefa v. Apple and Amazon,* the Tribunal had concerns about the proposed class representative's funding arrangements and decided that the proposed class representative should be cross-examined on these arrangements at a hearing. Following this hearing, the CAT handed down a judgment finding that the proposed class representative lacked adequate understanding of the funding arrangements and did not demonstrate sufficient control of the litigation.[76] This decision will likely encourage claimant-side stakeholders to closely scrutinize and understand their funding structures.

CONCLUSION

In conclusion, the comparative analysis of antitrust class actions in the US and the UK reveal key differences between the two countries, rooted in their distinct historical context, legal frameworks, procedural approaches, and cultural attitudes towards antitrust laws and collective redress. While the US system, characterized by its well-established class action mechanism, provides a robust avenue for addressing antitrust violations and promoting consumer protection, it also faces challenges such as potential abuse, high litigation costs, and unnecessary delays. On the other hand, the UK, with its more recent adoption of collective proceedings under the Consumer Rights Act 2015, reflects a notably cautious yet progressive approach aimed at balancing effective redress with safeguards against frivolous claims. As both jurisdictions continue to evolve, the overall landscape of antitrust enforcement and collective redress will undoubtedly benefit from ongoing comparative insights, fostering practices that protect individuals around the world from violations of anticompetition laws.

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74 "The State of Antitrust Enforcement and Competition Policy in the U.S." (the Report), dated April 14, 2020.

75 *Id.*

76 1602/7/7/23 *Christine Riefa Class Representative Limited v. Apple Inc. & Others.*

HOW LOW DO ANTITRUST LAWS LET YOU GO? RECENT DECISIONS REGARDING DISCRIMINATORY, PREDATORY, AND BELOW-COST PRICING

By Ryan Sandrock and Kevin Burke[1]

Most antitrust cases are about allegations of high prices: competitors who agree not to discount, monopolists who exclude price-cutting competitors, and acquisitions where an incumbent wants to grab market share to lessen competition and raise prices. And so most antitrust defenses are about low prices: the alleged price-fixers are sharp-elbowed discounters, the alleged monopolist is winning through better and competitively priced products, and the challenged acquisition would result in efficiencies and lower prices. These cases roughly equate harm to competition with harm to consumers in the form of higher prices, and both sides fight over the price charged at checkout to an end-user consumer.

Claims based on the opposite theory—that low prices have harmed competition in some way—are far less common.[2] The checklist for antitrust counselors on (too) low prices used to be pretty simple. **First**, to guard against Robinson-Patman claims of unlawful pricing discrimination,[3] only charge different prices for commodities where there is a justification for the variance—different costs (volume discounts) or an attempt to meet a competitor's price. In practice, Robinson-Patman claims were antitrust unicorns, lawyers liked to sketch them in their treatises but no one had seen one in real life. There were even calls to abandon Robinson-Patman completely. **Second**, to prevent a monopolization claim based on predatory pricing, do not adopt a strategy of pricing so low that competitors exit the market, allowing the company to recoup its losses by charging exorbitant prices when it is the only seller left standing. Again, in real markets, this situation was almost an impossibility. **Third**, to defend against below-cost pricing laws in California, do not price low with the goal of destroying competition. As described in a prior article in this publication, while California below-cost pricing law appears more lenient than federal law,

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2 Robinson-Patman, predatory pricing, below-cost pricing, and the other potential claims discussed in this article are all different claims, with different elements of proof. They do share a common thread: a narrative that prices are too low, not too high. And our grouping of these claims reflects the practitioner's reality that the same conduct can sometimes drive multiple, overlapping claims or defenses. There are not many one count antitrust complaints or one affirmative defense antitrust answers.

3 Price "discrimination" in the Robinson-Patman context means charging similarly situated customers different prices. It is distinct from the anti-discrimination pricing concerns of laws like the Fair Housing Act, which promote charging the same price to consumers without consideration of inappropriate factors.

that leniency is probably just at the pleading stage—with most California claims eventually failing for the same reasons as federal claims.[4]

This article provides an update on where antitrust law stands in 2025 regarding claims challenging low prices. The impetus for this article is that the antitrust revolution of recent years has forced enforcers and litigants to think in new ways about the proper goals of antitrust law, including whether a focus on low prices can go too far. The first part of this article outlines the theory of competitive flourishing motivating these challenges. The short version is that there are questions about whether the simple equation of low prices and competition is legally and philosophically correct. Lina Khan's *Amazon's Antitrust Paradox* spread the idea that low prices to end-user purchasers are not always good because they could come packaged with unacceptable damage to mom-and-pop sellers, upstart competitors, and environmental/labor/other social interests.[5] Pricing actions—particularly in the Robinson-Patman context—are now litmus tests for antitrust ideology, "whose side are you on" accusations,[6] and competing versions of American exceptionalism.

The second part of this article turns from theory to practice and explains how, despite the antitrust revolution, it remains difficult to prevail on claims challenging prices as too low. The simple "low prices are good" counter still works. The section discusses the uncertain status of the FTC's new Robinson-Patman enforcement challenges, continued plaintiff-side wariness about framing their claims in a classic *Brooke Group*/predatory pricing framework, and California decisions emphasizing the high hurdle for pleading competitor costs in California below-cost pricing claims.[7]

The third part of this article looks ahead to what might change to give more energy to cases challenging lower prices, focusing on potential legislation specifically intended to take away long-standing defenses against pricing claims.

NEW QUESTIONS ABOUT CONSUMER WELFARE STANDARD AND WHAT LOW PRICES ARE GOOD

Three Rehnquist Court antitrust decisions emphasize the limited viability of antitrust claims based on low prices. In *Atlantic Richfield Co. v. USA Petroleum Co.*, the court stated that "Low prices benefit consumers regardless of how those prices are set, and so long as

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4 Ryan Sandrock and Stephen Chang, *Below-Cost Pricing: Recent Defense-Friendly Decisions*, Competition, 26(1) (Spring 2017). ("A below-cost pricing claim under California's Unfair Practices Act (UPA) appears at first blush to be easier to plead and prove than a predatory pricing claim under the Sherman Act. . . . Several recent cases, however, show that despite the California law's seemingly easier standard, plaintiffs have had problems prevailing on Section 17043 claims.")

5 Lina Khan, *Amazon's Antitrust Paradox,* 126 Yale L. J. 710 (2017) ("We cannot cognize the potential harms to competition posed by Amazon's dominance if we measure competition primarily through price and output.")

6 *See, e.g.,* Dissenting Statement of Commissioner Mellisa Holyoak in the Matter of Southern Glazer's, File No. 21100155 (December 12, 2024) ("Those who do not learn from history too often repeat it. Equally true—and relevant to today's Complaint—is that those who are wrong about history refuse to be disabused. The mistaken views of the history of the Robinson-Patman Act (the Act) illustrate this point well.")

7 Because this is a California Lawyers Association publication, and because of the uniqueness of California's Unfair Practices Act, this article focuses on California law regarding below-cost prices.

they are above predatory levels, they do not threaten competition."[8] Then, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, the court explained that "predatory pricing schemes are rarely tried, and even more rarely successful."[9] Finally, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the court established a clear, extremely difficult to meet, test for predatory pricing claims.[10] In *Brooke Group*, the court held that predatory pricing requires a showing that (1) a competitor's low prices were below an appropriate measure of costs and (2) the competitor could later recoup its investment in below-cost prices.[11] *Brooke Group* was a Robinson-Patman case but the court made clear that its recoupment requirement also applies to Section Two claims.[12]

A steep decline in Robinson-Patman enforcement roughly paralleled the Supreme Court's restrictive predatory pricing decisions. The Department of Justice in 1977 issued a report encouraging consideration of a Robinson-Patman repeal.[13] This Robinson-Patman skepticism persisted, with the Antitrust Modernization Commission in 2007 advocating for repeal.[14] FTC Commissioner Melissa Holyoak provides a detailed history of the decline of Robinson-Patman enforcement in her blistering dissent regarding the first of the FTC's recent Robinson-Patman cases (Southern Glazer's, discussed below).[15]

Low prices as the ultimate antitrust goal is part of the "consumer welfare" standard. And this standard was not very controversial outside of some very wonky circles. At some point the Chicago School had become the foundation of modern antitrust law.[16] That all changed in the past decade. In a story that is now legend, a law student, Lina Khan, emerged to challenge Robert Bork's Antitrust Paradox with her piece *Amazon's Antitrust Paradox*. One of her key arguments was that predatory pricing law was insufficient to confront anti-competitive conduct in markets dominated by tech platforms. More broadly, she questioned whether antitrust law should focus on consumer welfare.

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8 *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

9 *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-590, 89 L. Ed. 2d 538, 106 S. Ct. 1348,

10 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993).

11 *Id.* at 222-224.

12 *Id.*

13 See Department of Justice Report on the Robinson-Patman Act, available at https://www.justice.gov/atr/media/1378486/dl?inline

14 Antitrust Modernization Commission, Report and Recommendations (April 2007), available at https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm

15 Dissenting Statement of Commissioner Mellisa Holyoak in the Matter of Southern Glazer's, File No. 21100155 (December 12, 2024)

16 Skepticism about Robinson-Patman and predatory pricing is unquestionably "Chicago School." But by the late 1990s and early 2000s, it felt like the entire antitrust world believed in some Chicago School points. Even President Barack Obama, thought by his detractors to be far left on many issues, had a relatively modest antitrust agenda (coincidentally or not, President Obama taught at the literal University of Chicago Law School in the 1990s and early 2000s alongside many Chicago School proponents and a few Chicago School critics).

The power of this new antitrust generation then expanded. Lina Khan became the chair of the FTC. And, along with Jonathan Kanter at DOJ and Timothy Wu at the White House, became leaders of a "Neo-Brandeisian" antitrust movement.[17] Then, as Donald Trump's election put Republican enforcers back into power, many Republicans embraced parts of the new antitrust. Vice-President Vance and antitrust chief Gail Slater talked of "hillbilly antitrust."[18] Mark Meador, who had previously advocated for increased Robinson-Patman enforcement, became an FTC commissioner.

There will be scores of books and articles about this messy and exciting time in antitrust history. What matters for this article is that—since the 2017 piece in this publication on below-cost pricing—there has been a willingness to reconsider Chicago School views on the goals of antitrust. No longer do antitrust lawyers, judges, or the antitrust press assume that low prices are the only antitrust value. This shift should have sparked a wave of Robinson-Patman, *Brooke Group*, and Section 17043 claims. But, as described in detail below, any wave has been of low magnitude.

STILL CHALLENGES TO LOW PRICES ARE DIFFICULT TO PLEAD AND PROVE (PRACTICALLY AND POLITICALLY)

Robinson-Patman Claims and Defenses

Robinson-Patman Section 2(a) bars price discrimination in sales of commodities. Sections 2(d) and (e) bar discriminatory promotional allowances. Price discrimination can injure competitors (primary-line discrimination) or customers (second-line discrimination) or customer's customers (third-line discrimination). Section 2(a) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

The elements of a Section 2(a) claim are that: (1) the relevant sales were made in interstate commerce; (2) the product sold to the competing purchasers was of the same grade and quality; (3) the seller discriminated in price between the two purchasers; and (4) the effect of the price discrimination injured competition in a manner that advantages the favored purchaser (or competitor).[19]

The FTC filed two high-profile Robinson-Patman cases at the end of President Biden's term: one against Southern Glazer's Wine and Spirits and one against Pepsi. The

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17 There were even "Wu & Khan & Kanter" coffee cups.

18 https://www.politico.com/news/magazine/2025/05/09/gail-slater-donald-trump-antitrust-00277348

19 *Volvo Trucks N. Am. Inc. v. Reeder-Simco GMC*, Inc., 546 U.S. 164, 177, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006).

first case alleged that Southern Glazer's "violated the Robinson-Patman Act by selling wine and spirits to small, independent 'mom and pop' businesses at prices that are drastically higher than the prices Southern charges large national and regional chains."[20] The FTC asserted claims under Section 2(a) of the Robinson-Patman Act. That provision makes it illegal to discriminate in price between two or more competing buyers, where "the effect of the discrimination may be substantially to lessen competition."[21] The FTC asserted a "secondary line" harm theory—meaning the conduct harmed competition between purchasers (whereas a "primary line" case would involve harm to competition between sellers—similar to the harm in a predatory pricing case). Judge Slaughter of the Central District of California denied Southern Glazer's motion to dismiss in April 2025 and the case is pending.

The fact that the case survived a motion to dismiss could support an argument that there is growing support for cases attacking low prices. But the weight of the evidence going the other way is substantial. Not only does the case have a long way to go but the process of filing the complaint was remarkably contention, with Commissioner Melissa Holyoak filing an 88-page dissenting statement, outlining all the reasons why the FTC's complaint should fail. This dissent began with a defense of price competition:

> The goal of antitrust can be stated in one word: competition. Competition promotes rivalrous markets, facilitates the allocation of resources to their best and most highly valued use, spurs innovation, and maximizes consumer welfare. It also stimulates growth and expands economic opportunity. But effective competition depends upon the freedom of firms to choose prices that reflect the information and knowledge available to them. Indeed, price competition is the electric cord that links today's ideas with tomorrow's economic prosperity.[22]

The dissent continued by saying that Southern Glazer's pricing was "plainly innocuous or even procompetitive" and that "it manifestly defies logic to suggest that the mere presence of discounting is dispositive proof that there has been harm to competition."[23] The dissent then cited the *Atlantic Richfield* decision's endorsement of low prices.[24]

The Pepsi case provides even stronger support for skepticism about Robinson-Patman claims. The FTC filed the case against Pepsi in the Southern District of New York, a few days before the start of the second Trump administration. The complaint alleged violations of Sections 2(d) and 2(e) of the Robinson Patman Act, sections barring firms from evading the price discrimination bar of Section 2(a) by giving side discounts to favored customers. But then, just four months later, the FTC dismissed the complaint. And, again, the energy in the FTC's statements regarding the decision to file was remarkable given the rather staid

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20 *FTC v. S. Glazer's Wine & Spirits*, LLC, No. 8:24-cv-02684-FWS-ADS, 2025 U.S. Dist. LEXIS 94533, at *1 (C.D. Cal. April 17, 2025) (quoting complaint).

21 15 U.S.C. § 13(a).

22 Dissenting Statement of Comm'r Melissa Holyoak, In the Matter of Southern Glazer's, Matter No. 2110155, at 2–6 (Dec. 12, 2024).

23 *Id.*

24 *Id.*

recent history of Robinson-Patman. Commissioner Ferguson said that the January filing was "an insult to the Commission's credibility, its hardworking and talented staff who care deeply about their significant work, and the American people."

The substantive deficiencies in the complaint, according to the commissioners issuing statements in May 2025, were that it treated a Section 2(e) claim like a Section 2(a) claim and also did not allege Pepsi actually refusing to offer comparable terms to different buyers:

> In the prior administration's rush to file a complaint, it betrayed a basic understanding of the structure and text of the RPA. Its approach treated distinct statutory provisions as if they are malleable and interchangeable—collapsing the different pleading requirements required for bringing Section 2(a), 2(d), and 2(e) claims into a series of generalized grievances untethered from the RPA's statutory framework. A key element of any RPA claim is proving discrimination between competing buyers. Yet the complaint does not mention even a single example of Pepsi refusing to offer comparable terms to other buyers. Nor does it offer any meaningful context regarding how purported disfavored "competing retailers" were identified.

The commissioners nevertheless emphasized that the Robinson-Patman is good law and that the Commission would bring Robinson-Patman cases in appropriate circumstances. Still, there is little question that there will be no wave of price discrimination cases any time soon.

Brooke Group and Section Two Predatory Pricing Claims

Brooke Group is the most important predatory pricing case. It states a clear Chicago School/consumer welfare standard view that low prices are almost always good. And it establishes two—very difficult to meet—elements: (1) "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs" and (2) recoupment. The second element means that the "below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly."

It is difficult to imagine many markets where pricing below cost could be sustained for so long as to allow the losses to be recouped later. That said, it is possible to get past a motion to dismiss on a Section Two predatory pricing claim. In *Hurst Int'l, LLC v. Sinclair Sys. Int'l, LLC*, the complaint alleged that a seller of produce labeling machines, with a 70-80% market share, was monopolizing a the market for produce labeling machines through multiple acts, including "offering free or below-cost labeling machines and labels." The court found that plaintiff sufficiently alleged that the prices were below cost (free is below-cost) and a dangerous probability of recoupment (because there were allegations of competitors having to exit the market). However, the case was dismissed before further substantive proceedings, making it unclear whether these allegations would have held up.

The most recent predatory pricing decision shows that recoupment remains a high hurdle and the Chicago School lives. The Seventh Circuit recently considered claims that Archer Daniels Midland sold ethanol at below-cost prices. The court upheld the dismissal of these claims on several grounds, including that the amended complaint did not allege that "ADM completed its predatory pricing scheme by charging monopoly prices to recoup its losses from below-cost prices." The decision emphasized how low prices are generally good for consumers:

> The recoupment requirement ensures that any antitrust claim based on low prices involves harm to consumers through eventual high prices. And when low prices today do not precede high prices tomorrow, consumers receive the "boon" of lower prices (even if competitors must brave the curse of the same). Under United Wisconsin Grain's theory, the low prices ADM set in motion will remain low because ADM profits from financial tools it purchased in the investment market. This is a benefit, not a burden, for consumers.[25]

Again, the common sense point that low prices benefit consumers still has power. For this reason, as discussed in more detail below, plaintiffs often try to frame claims about low prices as something other than pure predatory pricing claims. Alleging a Section 2 predatory pricing claim invites *Brooke Group* briefing and plaintiffs would rather fight on different fronts.

California Section 17043 Claims

Section 17043 of the California Unfair Practices Act provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." The elements of a Section 17043 claim are (1) a below-cost sale; (2) undertaken for the purpose of injuring competitors or destroying competition that; (3) causes a competitive injury.[26]

A Section 17043 claim does not require that a plaintiff prove: (1) that defendant had a dangerous probability of recouping its investment in below-cost prices or (2) that prices were below an appropriate measure of defendant's costs—average variable costs—in the short term.[27] But, in practice, Section 17043 claims frequently fail. So, at first glance, a Section 17043 claim appears to be far easier to prove than a Section 2 predatory pricing claim. But in practice UPA claims are hard to prove, in large part because of the "purpose" requirement. That requirement in many cases ends up defeating Section 17043 claims because the defendant may be able to prevail by showing the purpose was to lower competition.

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25 *United Wis. Grain Producers LLC v. Archer Daniels Midland Co.*, No. 22-2993, 2025 U.S. App. LEXIS 17890 at *11-12 (7th Cir. July 18, 2025) (cleaned up)

26 *Bay Guardian Co. v. New Times Media LLC*, 187 Cal. App. 4th 438, 453 (2010)

27 See *Bay Guardian*, 187 Cal. App. 4th at 459 (declining to find an implied recoupment requirement within Section 17043); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (U.S. 1993) (defining recoupment under federal law); *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1394 (8th Cir. 1993) (describing federal average variable cost requirement).

Several recent cases have confirmed the difficulty of even pleading Section 17043 claims, with the below-cost element tripping up plaintiffs even before purpose comes into play. In *Little v. Pacific Seafood Procurement*, plaintiff alleged that a competitor had priced live prices "below cost" in violation of California law. The Court dismissed this claim because plaintiff had not alleged the competitor's "cost of doing business," including the cost of cooking and shipping crab.

In *Pacific Steel Group v. CMC Steel* Fabricators, plaintiff alleged that competitors sold a type of steel installation below cost with the purpose of injuring and destroying competition. The court denied the motion to dismiss, after going through an extensive discussion of the standard for pleading a competitor's costs. The court in the end found that plaintiff had met this standard but the decision nevertheless emphasizes the difficulty of even pleading a 17043 violation

It is common for plaintiffs to be unable to plead the necessary information to allege plausibly that a defendant has priced below cost. For example, in *Ohio House LLC v. City of Costa Mesa*, the court rejected a plaintiff's claim that a competing group home had priced below cost.

COMPLICATIONS AND POTENTIAL CHANGES

But companies must remember that there are market and state specific complications to the general rules regarding predatory pricing. In the pharmaceutical context, for instance, brand drug manufacturers cannot necessarily rely on the absence of predatory pricing to immunize conduct that is part of a larger anticompetitive scheme. *Mylan Pharmaceuticals Inc., v. Teva Pharmaceuticals Industries Ltd.* is illustrative in this regard.[28]

In *Mylan v. Teva*, Mylan alleged that Teva engaged in anticompetitive conduct designed to delay FDA approval of generic Copaxone products, and to prevent Mylan's lower priced generic Copaxone products from gaining significant market share once they were approved.[29] Teva attempted to carve up the case with a motion to dismiss that attacked different aspects of the pre- and post- approval activities. One target was Mylan's claim that Teva improperly entered exclusionary agreements with Pharmaceutical Benefit

28 *Mylan Pharms. Inc. v. Teva Pharms. Indus. Ltd.*, No. CV 21-13087 (JXN) (JSA), 2025 WL 756793 (D.N.J. Feb. 27, 2025) ("*Mylan v. Teva*").

29 *Id*. at *1.

Managers ("PBMs") [30] (i.e., the gatekeepers of the formularies that decide which drugs healthcare plans reimburse) in exchange for price discounts and rebates.[31]

Teva argued that Mylan's formulary exclusion theory should be dismissed under the "Price-Cost Test" because there were no allegations that Teva charged prices for Copaxone that were below its marginal cost.[32] The Special Master appointed to provide recommendations on the motion concluded that the factual allegations in Mylan's complaint were inappropriate for analysis under the "Price-Cost Test," as applied in the Third Circuit, because mechanisms of exclusionary conduct beyond pricing discounts were plausibly alleged.[33] To support this conclusion, the Special Master relied on allegations that a Rebate Agreement conditioned the payment of rebates on the complete exclusion of generic Copaxone from formularies, and allegations that Switching Agreements incentivized PBM-owned specialty pharmacies to replace generic Copaxone with the brand (i.e., the opposite of what is supposed to happen under state automatic substitution laws). Teva's alternative argument that Mylan's formulary exclusion theory should be dismissed under the "Rule of Reason Test" was also rejected,[34] and the Special Master noted that "the issue of which test applies may be undertaken anew" after the completion of discovery.[35]

The ultimate disposition of Teva's price-cost defense will be interesting to watch going forward because the defense sits at the crossroads between the price-focused, Chicago School paradigm of antitrust law, and the more wholistic new view of antitrust law. On the one hand, it could be argued that application of the "Price-Cost Test" to Mylan's formulary exclusion theory is consistent with the purpose of antitrust law because Teva's restrictive contracts saved healthcare plans money and put branded Copaxone in the hands of the insured. On the other hand, it could be argued that application of the "Price-Cost Test" to Mylan's formulation exclusion theory is inconsistent with the purpose of antitrust law because Teva's restrictive contracts kept low cost generic Copaxone off the market and the endorsement of restrictive agreements like this would harm competition

30 PBMs manage prescription drug benefits for their clients (e.g., health insurance companies, large companies, government entities, etc.) and negotiate with drug manufacturers for better prices and rebates in connection with the drug formulary design services that they provide. *See* Fed. Trade Comm'n, Office of Policy Planning, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, Interim Staff Report at 9-10 (July 2024) ("PBMs and their health plan clients often specify the brand, generic, and specialty drugs that will be included on drug formularies (and therefore covered by payers for their beneficiaries) and the associated patient cost-sharing requirements. . . . PBM and health plan decisions about formulary designs influence whether insured Americans can access the drugs their doctors prescribe, and at what cost."), available at https://www.ftc.gov/reports/pharmacy-benefit-managers-report.

31 Mylan further alleged that Teva's anticompetitive conduct also included serial petitioning of the FDA to delay the approval and launch of generic Copaxone products, a marketing campaign designed to get medical professionals to write "Dispense as Written" prescriptions to override state substitution laws that automatically switch prescriptions to low priced generics, and a product "hop"/soft switch program aimed at shifting demand towards a new dose of Copaxone that did not face generic competition. *See Mylan*, 2025 WL 756793 at *4-7.

32 *See id.* at *5.

33 *See id.* at *19.

34 *See id.* at *19-22.

35 *Id.* at *19.

over time. The fact that PBMs are the counterparties to Teva's exclusionary agreements (and beneficiaries of Teva's rebates) could be a factor that weighs against application of the "Price-Cost Test" because PBMs have been recognized as middlemen in the distribution chain that inflate drug costs, which undercuts the rationale for looking to price as a measure of efficiency and consumer benefit.[36] Perhaps *Mylan v. Teva* will provide further support for setting aside the "Price-Cost Test" in situations where markets are imperfect.

The law could also change. For example, in California, the California Law Review Commission has proposed two changes that could allow for more below-cost pricing claims under both the Cartwright Act and the Unfair Practices Act. First, the Commission proposed an amendment providing that Cartwright Act liability would not require a finding that "in a claim of predatory pricing, the defendant is likely to recoup the losses it sustains from below-cost pricing of the products or services at issue." Second, the Commission also explained that "The Legislature should be aware that the requirement for a plaintiff in a UPA case to prove that the defendant had the 'purpose' to destroy a competitor can be a difficult hurdle for the plaintiff to overcome, because the defendant can argue that its purpose was to lower prices for legitimate business reasons. The Legislature might consider altering this standard."

But the Commission in the end backed off from this recommendation, concluding that "the Legislature should recognize that removing this intent requirement from the UPA might stifle procompetitive price competition that benefits consumers. The goal of promoting competition would be undermined if the UPA were to protect less efficient firms from facing competition on the merits from their more efficient rivals."

There have been similar proposals to amend federal law to make predatory pricing claims easier. For example, the Competition and Antitrust Law Enforcement Reform Act (CALERA), by Senator Amy Klobuchar, would moot *Brooke Group*. The proposed law says that "exclusionary conduct" need not include a showing that "any price of the defendant for a product or service was below any measure of the costs to the defendant of providing the product or service or that a defendant with significant market power in a relevant market has recouped or is likely to recoup the losses it incurred or incurs from below cost pricing for products or services in the relevant market.

CONCLUSION

So, despite increasing antitrust energy, antitrust claims based on lower prices still require particularly strong facts. Harm from lower prices can be counterintuitive, contrary to common sense, and raise complex questions about the purposes of antitrust law. Current concerns about inflation might raise the bar even higher, at least for a while. That said, there always will be the possibility of some coherent case of low prices harming competition, depending on the particular market and conduct. Individual market characteristics always matter in antitrust.

The three checklist points from the opening paragraphs therefore remain good law and good advice: have a legitimate justification for pricing variance, do not price with the goal of clearing the market now and gouging later, and do not price to destroy competition. Or

36 *See* fn. 30.

simplified into one point: compete vigorously on price. But there probably now is another checklist point: think about the larger competitive context. Could low pricing be fairly or unfairly lumped together with other allegedly exclusionary conduct? The circumstances in which low pricing really will harm competition should always be limited but the demise of pure Chicago School and *Brooke Group* thinking increases antitrust risk at least a little.


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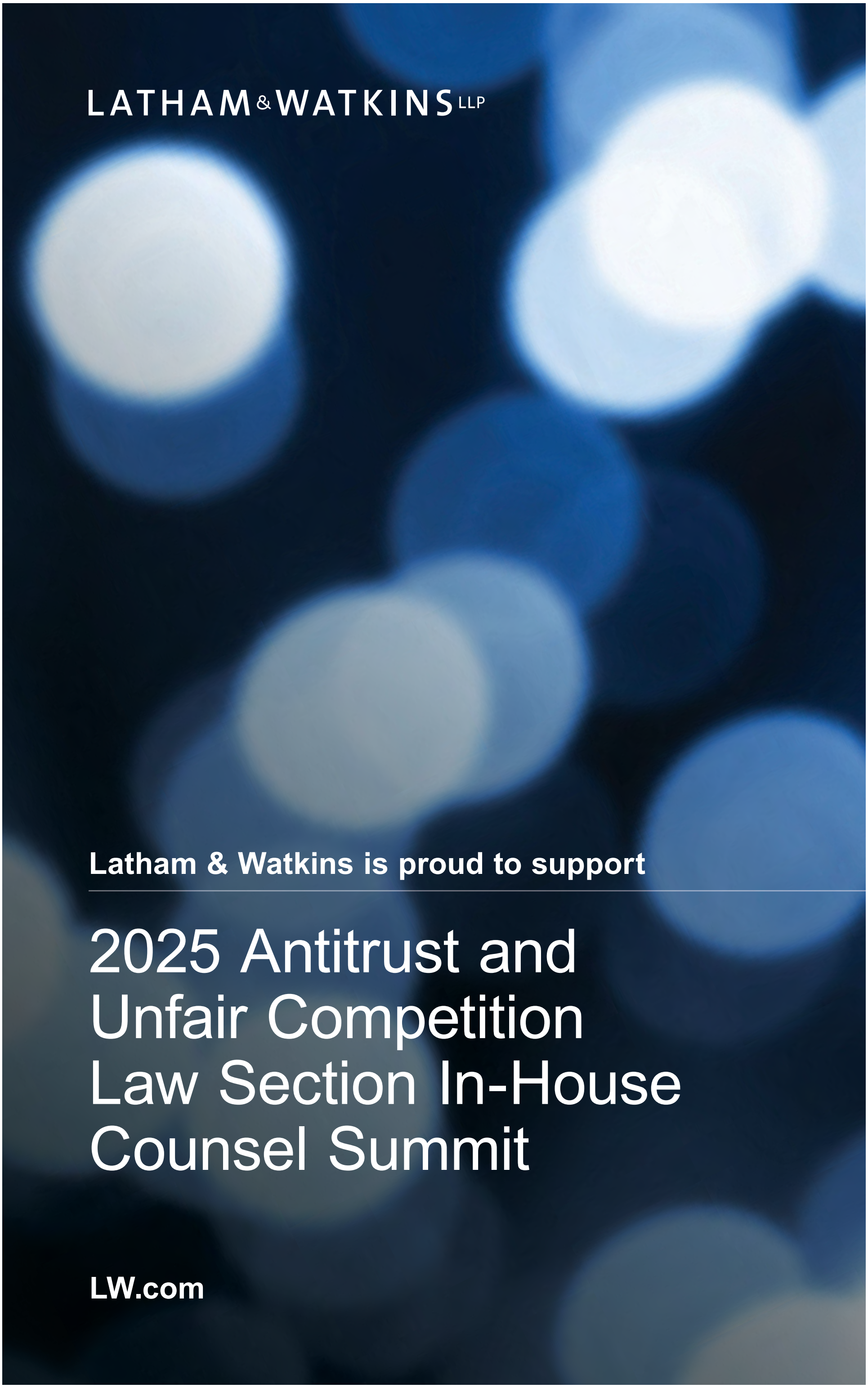
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