DEPARTMENT OF JUSTICE

Recent Developments and Emerging Trends in Litigation

MICHAEL MURRAY
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for the
New York State Bar Association March Meeting

New York, New York
(teleconference from Washington, D.C.)

March 17, 2020

Thank you for inviting me to speak today and for that kind introduction. This morning I will discuss my perspective from within the Division on recent developments and emerging trends in litigation. My perspective is informed by my experience having worked with the Division for over three years now—over a year and half from the Deputy Attorney General's office and over a year and a half as a DAAG inside the Division. It also is a perspective that has changed over time, as my focus has shifted from appellate and litigation matters to merger and conduct investigations in all of our civil sections.

My talk will proceed in three parts. First, I will discuss recent developments on the appellate and litigation front. Second, I will discuss some emerging litigation trends. Finally, I will close with a discussion of the Division's responses to these developments and trends.

I. RECENT DEVELOPMENTS: APPELLATE, AMICUS, AND LITIGATION

A. *Overview*

Under the current organization of the Division, the appellate section performs three important functions: it conducts appellate litigation, it provides what some call issues-and-appeals support to investigative and litigation teams,

and it handles the amicus program, which includes filings not only in appellate courts, but also participation in district courts and international tribunals.[1]

For those tasks, it relies on a group of highly experienced, incredibly talented attorneys. We have some of the finest attorneys in the Division—indeed, just this past year, one of our newer attorneys received an individual Assistant Attorney General's award for her superior work in connection with the CVS/Aetna matter and several attorneys received awards as part of case teams.[2] And our attorneys routinely are complimented by courts and even opposing counsel for their oral arguments and written advocacy.[3]

The staff resources devoted to the three tasks of appeals, litigation, and the amicus program ebb and flow over time. In 2019, and as I announced at the ABA spring meeting last year, we anticipated filing a record number of amicus briefs. We, in fact, outpaced my prediction of 18, filing 24 by years end.[4] As our Assistant Attorney General has oft described, the goal of these filings and the amicus program is threefold: first, to help ensure the proper advancement of antitrust law by bringing our expertise as objective enforcers to bear on current

[1] *See, e.g.*, Oyez Oyez! The Antitrust Division Expands Its Appellate and Amicus Program, Division Update Spring 2018, *available at* https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-expands-its-appellate-and-amicus-program.
[2] *See, e.g.*, Presentation of the Antitrust Division Assistant Attorney General Awards (Jan. 21, 2020), *available at* https://www.justice.gov/opa/blog-entry/file/1236406/download.
[3] *See, e.g.*, *In re Cathode Ray Tube Antitrust Litigation*, Transcript of Proceedings at 14-15, No. 4:07-cv-05944 (N.D. Cal. June 12, 2019), Dkt. 5503 (statement of interest of United States was "very helpful" and subsequently adopting its arguments).
[4] Appellate Briefs, Antitrust Division, *available at* https://www.justice.gov/atr/appellate-briefs.

private cases; second, to leverage our limited resources for enforcement in an efficient way; and, third, to further the development of staff's expertise and experience as advocates.[5]

I am proud to report that our program in 2019 was remarkably successful. Even though our briefs tend to focus on disputed areas of law, where the answer to a particular legal question is not clear cut, we have earned a 12-0-1 record, with 11 cases still pending, in the briefs that we filed in calendar year 2019.

Our briefs have covered a range of issues in a range of courts supporting a range of outcomes. We have filed briefs that attempt to narrow immunities and exemptions—indeed, a third of our briefs are on that topic,[6] briefs that discuss the intersection of IP and antitrust,[7] and briefs on substantive questions of antitrust law,[8] such as *Aspen Skiing*.[9] We have filed in federal, state,[10] and international courts[11]: forty percent of our filings come at the appellate stage, sixty percent at the trial level. And our positions tend to support a range of parties: sixty percent

[5] *See* Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are in the Works*, *Law360* (Jan. 19, 2018), *available at* https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-inthe-works ("[w]e will be the officious inter-meddlers in random cases," that "[w]e're not going to take anybody's side, but the side of what we believe the . . . law should be.").
[6] *E.g.*, Brief of the United States and the Federal Trade Commission as Amici Curiae Supporting Plaintiff-Appellee, *SmileDirectClub, LLC v. Battle*, No. 19-12227 (11th Cir. Sept. 25, 2019).
[7] *E.g.*, Brief of United States as Amicus Curiae in Support of Neither Party, *HTC Corp v. Telefonaktiebolaget LM Ericsson*, No. 19-40566 (Fed. Cir. Oct. 30, 2019).
[8] *E.g.*, *Viamedia, Inc. v. Comcast Corp.*, _ F.3d _, 202 WL 879396 (7th Cir. Feb. 24, 2020).
[9] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985).
[10] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Respondent, *In re William E. Paplauskas, Jr.*, No. SU-2018-161-M.P. (R.I. Sept. 17, 2018).
[11] Letter Brief of United States re*: Austrian Federal Competition Authorty v. Nordzucker AG, et al.* (Austrian Supreme Cartel Court, No. 29 Kt 2/16k (Jan. 31, 2020).

of our briefs supported the plaintiff's position, thirty percent the defendant's position, and ten percent neither party's position. The program also garnered seven additional oral argument opportunities in 2019, and twelve overall in the past two years, as compared to less than half that number from party appeals. Finally, we efficiently used resources: our amicus brief in the *Seaman v. Duke* no-poach case led us to intervene and obtain a consent decree while expending less than one percent of the resources used to investigate a similar matter.[12]

Judges also repeatedly have thanked us for our briefing. One judge in the Northern District of California called our submission "very helpful" while adopting our position[13] and the Seventh Circuit solicited our views and then thanked us for them while adopting our position.[14] Indeed, the Seventh Circuit relied explicitly on our submissions twice in the past month alone, as have numerous other courts.[15]

Our program also has expanded beyond our borders, just as antitrust enforcement is global, so is the utility of the amicus program. Earlier this year, our letter brief was submitted to the Austrian high court in a sugar cartel case raising

[12] Statement of Interest of the United States, *Seaman v. Duke Univ.*, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019).
[13] *See In re Cathode Ray Tube Antitrust Litigation*, Transcript of Proceedings at 14-15, No. 4:07-cv-05944 (N.D. Cal. June 12, 2019), Dkt. 5503.
[14] *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*, 937 F.3d 1067, 1080 n.62 (7th Cir. 2019).
[15] *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 2020 WL 1059951 (7th Cir. Mar. 5, 2020); *Viamedia, Inc. v. Comcast Corp.*, _ F.3d _, 2020 WL 879396 (7th Cir. Feb. 24, 2020); *see, e.g., In re Railroad Industry Employee No-Poach Antitrust Litigation*, 395 F. Supp. 3d 464, 485 (W.D. Pa. 2019). *But see Oscar Ins. Co. of Fla. v. Blue Cross & Blue Shield of Fla., Inc.*, 413 F. Supp. 3d 1198 (M.D. Fla. 2019), *appeal pending*, No. 19-14096 (11th Cir. 2020).

issues related to the European equivalent of the double jeopardy concept. We advocated that it generally is proper for global enforcers to punish conduct harming consumers and competition within their borders regardless of punishments by foreign enforcers for conduct outside the domestic border.[16] We continue to monitor cases in foreign tribunals and discuss with our foreign partners areas where our expertise can benefit the resolution of antitrust disputes in other jurisdictions.

B. *Recent Decisions*

With that overview, I'll turn to briefly discuss what I think are four of the more significant litigation decisions in the past few months—some in our appellate program, some in the amicus program, and some in the litigation space.

First, the criminal program's most recent appellate victory is an important development, or perhaps it is better said to be a non-development. The case is *United States v. Sanchez*.[17] The United States charged the defendants for rigging bids in property foreclosure sales in California. After jury convictions, the defendants argued that the per se rule is unconstitutional. These arguments, in my opinion, emerge about fifteen to twenty years after a significant development in criminal procedure jurisprudence. The last round came after the criminal

[16] Letter Brief of United States re: *Austrian Federal Competition Authorty v. Nordzucker AG, et al.* (Austrian Supreme Cartel Court, No. 29 Kt 2/16k (Jan. 31, 2020).
[17] *United States v. Sanchez*, 760 F. App'x 533 (Jan. 25, 2019) (per curiam unpublished).

procedure jurisprudence developments in the 1950 and 1960s[18] and were roundly rejected by courts in the 1970s and early 1980s.[19] This round is about fifteen years after the *Apprendi* line of cases.[20] The defendants in *Sanchez* argued that the per se rule constitutes an unlawful mandatory evidentiary presumption that, contrary to *Morissette* and *Apprendi*, empowers the judge at the expense of the jury. The Ninth Circuit rejected that argument and the Supreme Court denied certiorari.[21]

Second, the amicus program's most recent victory is the latest word on the implementation of the Supreme Court's decision in *Apple v. Pepper*.[22] In *Marion v. Becton Dickinson*,[23] the Division argued that *Illinois Brick* does not bar buyers of health care products from suing both the manufacturer and the distributor of those products when those two types of entities conspired to engage in exclusive dealing and other related practices.[24] The court, in a unanimous opinion by Chief Judge Diane Wood, agreed, explaining that *Apple v. Pepper* confirms that "the applicability of *Illinois Brick* focuses on the relationship between the seller and the

[18] *E.g.*, *Morissette v. United States*, 342 U.S. 246 (1952) (concerning conclusive presumptions).
[19] *United States v. Manufacturers' Ass'n of Relocatable Bldg. Industry*, 462 F.2d 49 (9th Cir. 1972); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195-1196 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029, *and* 470 U.S. 1085 (1985); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).
[20] *Apprendi v. New Jersey*, 530 U.S. 466 (2000)
[21] *Sanchez v. United States*, _ U.S. _, 2020 WL 129558 (Jan. 13, 2020).
[22] *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019); *see* Michael Murray, Dep. Ass't Att'y Gen., Antitrust Division, U.S. Department of Justice, Recent Developments in the Jurisprudence of Direct and Indirect Purchasers, United States Council for International Business Competition Committee (Sept. 25, 2019), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-united-states-council.
[23] *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 2020 WL 1059951 (7th Cir. Mar. 5, 2020).
[24] Brief of United States, *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 2020 WL 1059951 (7th Cir. Mar. 5, 2020).

purchaser, not the difficulty of assessing the overcharge."[25] This decision sets the framework for both plaintiffs and defendants in indirect purchaser cases in two different respects: it clarifies the applicability, really inapplicability, of *Illinois Brick* to conspiracies of this sort and also provides guidance on proper pleading standards.

Third, and also in the amicus program, the Seventh Circuit issued a lengthy opinion in *Comcast v. Viamedia*[26] that touches on a variety of hot topics, including the *American Express* decision,[27] tying standards, and *Aspen Skiing*. The Division filed an amicus brief on that last topic, continuing its nearly twenty-year practice of arguing for the "no economic sense" test that the Solicitor General advocated for in *Trinko*[28] and that now-Justice Gorsuch adopted in the Tenth Circuit in *Novell*.[29] The court concluded that this test was "relevant but should not always be dispositive."[30] That is an advance in the law in the Seventh Circuit in our view. We will continue to monitor this case as it proceeds in the Seventh Circuit or to the Supreme Court.

[25] *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 2020 WL 1059951 (7th Cir. Mar. 5, 2020).
[26] *Viamedia, Inc. v. Comcast Corp.*, _ F.3d _, 2020 WL 879396 (7th Cir. Feb. 24, 2020).
[27] *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).
[28] *See* Brief of United States, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[29] *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1071 (10th Cir. 2013) (Gorsuch, J.)
[30] *Viamedia*, 2020 WL 879396, at *23.

Fourth, and finally, I would like to touch on Judge Marrero's decision in the T-Mobile/Sprint case.[31] There is much to discuss in Judge Marrero's opinion, but what I would like to focus on is his reliance on the views of the Division and the FCC. Judge Marrero correctly held that the approval of the merger with conditions by these two agencies "does not immunize it" from a private challenge.[32] Notwithstanding some contrary rhetoric in the public sphere, that is exactly what the Division advocated in its filing.[33]

Judge Marrero, however, also correctly held that he would accord the views of these agencies "some deference," because they are "intimately familiar with this technical subject matter, as well as the competitive realties involved" and because of their willingness to "stand ready to provide further consideration" and "supervision" of this space.[34] He then credited the Division's "efforts to establish DISH as a fourth nationwide MNO and replacement for Sprint" as "the most prominent remedies that contribute substantially to rebutting the Plaintiff States' prima facie case."[35] As Assistant Attorney General Delrahim has said, this decision is an important development not only for the future of this industry and

[31] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499 (S.D.N.Y. Feb. 11, 2020).
[32] *Id.* at *32.
[33] Brief for the United States and FCC, at 13, *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499 (S.D.N.Y. Feb. 11, 2020) ("The Litigating States bring their suit under Section 16 of the Clayton Act, 15 U.S.C. § 26. As Section 16 plaintiffs seeking a nationwide injunction, they face a more difficult test than the Antitrust Division would have faced had it sought to bar the parties' merger. *Cal. v. Am. Stores*, 495 U.S. 271, 295-96 (1990).").
[34] 2020 WL 635499, at *32-*33.
[35] *Id*. at *33.

consumer welfare, but also for its implications for the multi-enforcer regime that the Division, other agencies of the federal government, and the state attorneys general inhabit.[36]

C. Projections

There have been quite a few developments in antitrust litigation in the last few months. I would like to take a moment to offer two thoughts on what is coming in the near future.

First, with respect to the amicus program, this year is likely to see us file between twelve and eighteen briefs. That is below the number actually filed last year and more consistent with my prediction for last year at the spring meeting. The reasons for this change are perhaps obvious: the appellate section's primary mission is to support the party-based casework of the Division at both the appellate and trial levels and towards the end of last year and into this year we have litigated two significant criminal cases—*United States v. Lischewski* and *United States v. Aiyer*—and two significant merger challenges—Sabre/Farelogix and Novelis/Aleris. And there are a number of significant investigations in the Division right now. All of these matters draw on appellate resources as well as

[36] Makan Delrahim, "Getting Better:" Progress and Remaining Challenges in Merger Review (Feb. 5, 2020), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-media-institute-luncheon.

other Division resources. In addition, briefs filed last year often come to oral argument this year, which of course places additional demands on attorney time.

Second, I see several important potential decisions in the next few months. In private cases, there is an important class certification decision pending in the Ninth Circuit, *Stromberg*.[37] The district court certified a nationwide class of indirect purchasers, notwithstanding differences in state law.[38] The Division, joined by six states in the first ever U.S. government amicus brief filed jointly with state enforcers, argued on appeal that the district court decision was improper because it denigrated state interests in enforcing their own law. The Ninth Circuit held oral argument a few months ago and reports were that the court was favorably inclined to the defendant.[39] This decision could set the parameters for class certification of large classes of indirect purchasers. In public cases, there is of course the pending decision in the *FTC v. Qualcomm* case, which I had the privilege of arguing in the Ninth Circuit a few weeks ago.[40]

[37] Brief of the United States and the States of Alaska, Louisiana, Missouri, Ohio, Oklahoma, and Texas, *Stromberg v. Qualcomm*, No. 19-15159 (9th Cir. June 10, 2019).
[38] *In re: Qualcomm Antitrust Litigation*, 328 F.R.D. 280 (N.D. Cal. 2018).
[39] Bryan Koenig, *"Stick to Facts," Phone Buyers Told in Qualcomm Cert. Appeal*, *Law360* (Dec. 3, 2019), *available at* https://www.law360.com/articles/1224784.
[40] *FTC v. Qualcomm*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

II. EMERGING LITIGATION TRENDS AND RESPONSES

A. Trends

I would like to pivot now to a brief discussion of four trends I am seeing at the Division. The first is that the long-running debate on whether and how to consider remedies is increasingly relevant.[41] Courts often consider the remedies on the table at the merits phase. Sometimes, we think that this is the right approach: Judge Marrero's opinion in the T-Mobile/Sprint case is a good example of that, as I discussed above. Other times we think it is the wrong approach: Judge Leon's decision in AT&T is a good example of that.[42] Most recently, Judge Kelly's opinion in *Evonik*, the FTC's hydrogen peroxide case, addressed the relevance of a divestiture agreed to after litigation commenced.[43] The court placed the burden on the defendant to show that the divestiture would replicate the competitive landscape before the merger and found that the defendants had met that burden, rejecting the FTC's arguments that the divestiture was insufficient in scope because it was a stand-alone plant.[44]

The second trend concerns the Tunney Act. Last year, Judge Leon held the first ever live witness Tunney Act proceeding. This past month, Judge Kelly issued an order accepting amicus briefs in the T-Mobile/Sprint Tunney Act proceeding.

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[41] *E.g.*, David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, 31 *Antitrust* 10 (2016).
[42] *See* Reply Brief of the United States, at 19-21, *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).
[43] *Fed. Trade Comm'n v. RAG-Stiftung*, No. CV 19-2337 (TJK), 2020 WL 532980, at *15 (D.D.C. Feb. 3, 2020).
[44] *Id.* at *15-*18.

These are new times for the Tunney Act. The Division has consistently argued, with success in the D.C. Circuit in the *Microsoft* case, that Tunney Act procedures must be calibrated carefully so as not to infringe upon the separation of powers—more than a rubber stamp but less than a substantive re-evaluation of the prosecutorial decisions of the Executive Branch.[45] But there also is a practical perspective: these Tunney Act proceedings require resources, not only to prepare for the hearings themselves but also to prepare in the investigation phase for the possibility of hearings on issues that end up not addressed in the consent decree because the Division did not consider them worth pursuing extensively. The unsurprising result is slower merger reviews, with all that entails for the American consumer.

The third trend is that we are now in an age when merging parties or conduct case defendants encounter not only both active domestic and international enforcement agencies but also multiple active domestic enforcement agencies. No one can doubt the important role of state enforcers in a federal system of antitrust enforcement like that established by Congress, at least as interpreted by the Supreme Court.[46] States often know their local markets and industries best, and they bring that expertise to bear on cases as important partners in many of our

[45] *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).
[46] *E.g.*, *California v. American Stores Co.*, 495 U.S. 271 (1990).

investigations. Indeed, as I mentioned a few moments ago, this administration filed the first ever amicus brief that was joined by state enforcers, with the goal of protecting state prerogatives over the enforcement of laws within their states, in the *Stromberg* case.[47]

At the same time, there can be disagreements or differences between enforcers. The T-Mobile/Sprint case is an important example of a disagreement that we all know about. The LiveNation consent decree is an example of a difference. There, the Division settled what has been called "the most significant enforcement action of an existing antitrust decree by the Department in 20 years."[48] Several states did not oppose the entry of that settlement. Other states wanted to negotiate a settlement with LiveNation themselves, which they subsequently did. These two examples evidence that state and local enforcers are increasingly active and that merging parties and conduct case defendants will have to take account of that initiative.

The final trend is in some ways a non-trend. After the *AT&T* decision, there was some talk in the bar about whether Judge Leon's focus on live witness testimony, as opposed to ordinary course documents, would transform antitrust

[47] Brief of the United States and the States of Alaska, Louisiana, Missouri, Ohio, Oklahoma, and Texas, *Stromberg v. Qualcomm*, No. 19-15159 (9th Cir. June 10, 2019).
[48] Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster (Dec. 19, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live.

practice.[49] Two years later, I think we can say that the answer is no. Although courts continue to care a great deal about witness credibility—as they should, and as evidenced by Judge Marrero's comments in the T-Mobile/Sprint opinion[50]—they also care a great deal about ordinary course documents. Indeed, Judge Kelly's opinion in the *Evonik* hydrogen peroxide case is full of references to and analysis of the types of documents that enforcers, plaintiffs, and defendants have relied on for decades.[51]

B. Responses

One might ask how the Division is responding to these four trends. The answer is that we are focused on what is new and what we can control. Two of the four trends I discussed are really not new or earth-shattering—considering remedies at the merits phase and what persuades judges at trial. We always have been evaluating and re-evaluating our positions and strategies on these issues and will continue to do so.

Two of the trends, however—Tunney Act developments and trends in multiple enforcers—are somewhat new. But they also are not completely dependent on our actions. They depend on the actions and reactions of courts and

[49] *United States v. AT&T Inc.*, 310 F.Supp.3d 161 (D.D.C. 2018).
[50] *New York v. Deutsche Telekom AG*, No. 19 CIV. 5434 (VM), 2020 WL 635499 (S.D.N.Y. Feb. 11, 2020).
[51] *Fed. Trade Comm'n v. RAG-Stiftung*, No. CV 19-2337 (TJK), 2020 WL 532980, at *15 (D.D.C. Feb. 3, 2020).

other enforcers. So we have to focus on what we can control. We can control several practices.

We can control our continued attitude that we are not shy about enforcing the law. When we believe we have a case, we will bring it. Novelis/Aleris, Sabre/Farelogix, LiveNation, Quad/LSC, and the recent criminal trials are evidence of that. We will proceed when we think we are right, welcoming and coordinating with our law enforcement partners but not beholden to them and subject to judicial review but not cowed by fear of criticism, a hard road, or a loss.

We also can control the role that we play, that is, we can continue to work as enforcers and not regulators, preferring structural remedies and transparency. These types of remedies simplify, in many respects, the Tunney Act process, which at its best is dedicated to ensuring proper procedures in government decisionmaking without requiring judges to become expert regulators of myriad industries.

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In closing, this is an exciting time to be a member of the antitrust bar. Appellate and litigation developments proceed at impressive rates across cartel, merger, and conduct matters. Your clients continue to need your wise counsel and I hope today that I have contributed if only a small amount to helping you keep abreast of important developments in competition law. Thank you.