Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Competition Cases To Watch In 2016

By **Melissa Lipman**

Law360, New York (December 24, 2015, 8:38 PM ET) -- Federal appeals courts are brimming with antitrust cases that could see key decisions in 2016, from continued fighting over the contours of pay-for-delay litigation to a dispute over whether investors can sue over the manipulation of Libor that could trickle down to other benchmark litigation. Here's a look at those and a few other cases to watch in 2016.

Pay-for-Delay Litigation

More than two years after the U.S. Supreme Court ruled that pharmaceutical patent settlements could face antitrust challenges, litigation over the so-called pay-for-delay deals has only proliferated as district courts struggle to suss out the parameters of the rule-of-reason cases.

The Federal Trade Commission has continued to focus on the area, with the agency's own suit against AbbVie Inc. going forward and a landmark $1.2 billion disgorgement settlement with Cephalon Inc. in its pocket.

"Reverse payment or pay-for-delay is likely to remain a hot area for the foreseeable future," said Cooley LLP's Howard Morse. "It remains of great interest to the FTC and there is lots of money at stake."

So far two appeals courts — the Third Circuit and the California Supreme Court — have expressly said that the "pay" in pay-for-delay doesn't have to be a straightforward cash payment but can instead be other valuable consideration such as a promise by a brand not to launch a competing authorized generic.

But similar issues are still pending elsewhere, including the First Circuit, and it remains unclear exactly how broadly the lower courts will read the Third Circuit's decision.

"We've seen the law morph and there's still a fair amount of ambiguity," said Crowell & Moring LLP's Shari Lahlou.

Another issue at play in several cases, including an interlocutory appeal in litigation over Aggrenox that is now before the Second Circuit, is whether private plaintiffs have to show that the settlement agreement was the proximate cause of the damage they suffered by overpaying for the drugs and that without the reverse payment, a cheaper generic would have launched sooner.

"[That] means they may need to show that the patent would have been invalidated but for the agreement," Morse said.

Likewise the question of how to assess whether a side deal signed alongside a patent settlement gives the generic-drug company only the kind of fair compensation the Supreme Court suggested would not be particularly problematic will continue to be of interest.

"Who bears the ultimate burden of proof — whether the plaintiff must prove that side deals are a sham or the defendant must prove they are for fair value — remains an open issue," Morse said.

Mylan Pharmaceuticals Inc. et al. v. Warner Chilcott Public Ltd. et al.

Elsewhere in the pharmaceutical antitrust space, the Third Circuit is also primed to become the second appeals court in the space of a year to examine so-called product-hopping claims.

The New York Attorney General's Office won a landmark case at the Second Circuit in 2015 challenging Actavis PLC's decision to pull an older version of its Alzheimer's drug Namenda off shelves and replace it with a newer version. The goal of the swap, the state said, was to force patients to switch to the new, protected formulation before generic competition could launch and benefit from automatic substitution in pharmacies.

But Mylan Pharmaceuticals Inc. had less luck in its own product-hopping suit against Warner Chilcott PLC over acne medicine Doryx.

Mylan took aim at Warner Chilcott's efforts to switch the market to a different formulation of the drug in order to ward off competition without offering much benefit to consumers in the generic's estimation. But the district court concluded that Warner Chilcott didn't have monopoly power because the relevant market was not just generic and branded Doryx, but all oral acne medication.

The district court further ruled that the alleged product-hopping scheme wouldn't violate federal antitrust law even if the narrower market that Mylan had outlined was correct because the generic-drug maker could simply advertise its product to try to win sales instead of relying on automatic substitution.

But the FTC has weighed in on the appeal, warning the Third Circuit that the district court had "embrace[d] a rule of nearly per se legality for product-hopping conduct" that contradicted the decisions of other courts.

"The lower court certainly took a different approach than the Second Circuit did in the NY AG v. Actavis matter," Morse said. "If [the Third Circuit] made a decision that affirmed that lower court that could create a circuit split that would cause the issue to potentially go to the Supreme Court."

The case is Mylan Pharmaceuticals Inc. et al. v. Warner Chilcott Public Ltd. et al., case number 15-2236, in the U.S. Court of Appeals for the Third Circuit.

Benchmark Manipulation Litigation

Ever since some of the world's largest banks began admitting to manipulating the London Interbank Offered Rate, enforcers and private plaintiffs alike have been taking a hard look at other types of benchmarks and commodity prices that may have been the subject of similar plots.

The result has been a wave of cases, the earliest of which is now before the Second Circuit. The appeals

court heard arguments about whether private investors' antitrust claims over Libor should be reinstated in November, and a decision in 2016 could have implications across a field of cases.

"Everyone is watching the Second Circuit's anticipated decision in the Libor case," said Kellie Lerner of Robins Kaplan LLP, which represents Principal Financial Group Inc. in its Libor claims. "That's going to be incredibly important not just for the actual Libor case but I think for the other benchmarking cases that are percolating and making their way through the courts."

That includes cases like litigation accusing some of the world's biggest banks of manipulating the foreign exchange markets. While a New York federal judge recently gave preliminary approval to settlements nine banks inked with investors for about $2 billion, she also indicated she wanted more data about the plaintiffs' damages estimates before granting final approval.

And seven of the financial institutions that have yet to settle the case have asked the court to drop them from the suit, saying investors tied them to an exaggerated conspiracy theory in hopes of forcing a settlement.

Meanwhile, other cases are even earlier in the litigation process, including more than two dozen class actions accusing several financial giants of manipulating the prices of U.S. Department of the Treasury securities that were recently centralized in New York.

"There's a common thread of legal issues that are in all of these cases, and they all interrelate," Lerner said. "So some clarity from the Second Circuit I think is going to go a long way."

U.S. et al. v. American Express Co. et al.

The Second Circuit is also poised to rule in 2016 on American Express Co.'s bid to overturn the U.S. Department of Justice's trial victory in an antitrust case challenging rules that all major credit card companies used to have barring merchants from encouraging their customers to use other brands of credit cards even if those cards are cheaper to process.

The DOJ originally sued AmEx in October 2010 after it inked settlements with Visa Inc. and MasterCard Inc. over similar policies. Those companies agreed to change their anti-steering rules, but the government and the retailers maintained that all credit card companies have been able to keep the fees they charge merchants high in the alleged anti-competitive environment created by AmEx's rules.

After a seven-week trial during the summer of 2014, a Brooklyn federal judge agreed that AmEx's rules barring merchants from encouraging consumers from using other credit card brands violated antitrust law. He concluded that despite having only 26.4 percent of the relevant market of credit and charge cards, AmEx still had enough market power to thwart competition among credit card brands with its rules.

The Second Circuit heard arguments in the case in mid-December, and its eventual decision could shed light on how big a slice of a market a company must have to have market power as well as on how to analyze two-sided markets.

"The decision that American Express has market power with a 27 percent market share, that's pretty striking," said Cleary Gottlieb Steen & Hamilton LLP partner Leah Brannon. "Clients in other industries take note of that, and clients are always asking, 'At what market share should I be especially concerned?' "

With the traditional advice putting the threshold somewhere between 30 percent and 50 percent, guidance from the Second Circuit about whether the 26.4 percent share passes muster, and if so why, could prove useful, attorneys said.

The case is U.S. et al. v. American Express Co. et al., case number 15-1672, in the U.S. Court of Appeals for the Second Circuit.

In re: Domestic Airline Travel Antitrust Litigation

Airlines are hardly strangers to antitrust litigation, having faced a number of cartel cases over the years.

But the four biggest carriers in the U.S. — Delta Airlines Inc., Southwest Airlines Co., United Airlines Inc. and American Airlines Inc. — are facing litigation and a government investigation that's a bit more unusual than some of the past cases. That's because these suits focus on statements the airlines' executives have made about the need for "capacity discipline," or limiting the seats available on each route. The cases claim that the carriers artificially kept capacity low, which in turn keeps airfares artificially high.

"It's always interesting to see the collusion cases where there's a public statement made by an executive at a conference, that type of case pushing the bounds of what constitutes collusion," Brannon said.

In particular, companies will want to keep an eye on whether the suits, which have been centralized in Washington, D.C., survive a motion to dismiss, according to Brannon.

The DOJ, meanwhile, has not offered much in the way of details about its investigation, but the private lawsuits following in the wake of the watchdog's confirmation maintain that officials want copies of all of the communications the airlines have had with one another, Wall Street analysts and major shareholders addressing how many passengers they planned to carry or "the undesirability of your company or any other airline increasing capacity."

And the DOJ's investigation may also broach the possibility that joint ownership across the carriers — some investment firms like The Vanguard Group and BlackRock Inc. hold significant stakes of two or three of the airlines — has led to collusion, according to John Kwoka, an economics professor at Northeastern University who has studied the airline industry.

"Many people's suspicion is that DOJ is actually interested in the role of some of the Wall Street firms, investment houses and hedge funds in promoting coordination by the carriers," Kwoka said. "There certainly are examples ... where investment houses have pushed JetBlue, for example, to change some part of JetBlue's preferred business plan [and] they've been punished in their stock prices for not doing what Wall Street wanted."

The case is In re: Domestic Airline Travel Antitrust Litigation, MDL number 2656, before the U.S. Judicial Panel on Multidistrict Litigation.

--Editing by Katherine Rautenberg and Patricia K. Cole.