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October 18, 2022

On September 29, 2022, the Federal Trade Commission – alongside a bipartisan coalition of 10 state attorneys general – sued Corteva and Syngenta, challenging "loyalty programs" pursuant to which two of the largest pesticide manufacturers allegedly pay distributors to limit business with competing manufacturers.

The complaint – which seeks to shut down what the FTC calls an "illegal pay-to-block scheme" – borrows from the FTC's framework for challenging reverse payment settlements in the pharmaceutical industry, which the FTC calls "pay-for-delay" agreements. The action underscores the aggressive antitrust enforcement agenda being pursued by the Biden administration, which appears willing to bring novel and/or dormant antitrust theories.

While focused on competition in agriculture, which remains a top enforcement priority, the case has potential ramifications across industries for loyalty programs and vertical contracting practices more generally.

Aggressive enforcement climate

Over the past two years, the Biden administration has repeatedly promised to "tackle this new era of monopoly power," including in President Joe Biden's 2021 Executive Order on Promoting Competition in the American Economy targeting the "concentrated market power" in "agricultural input industries" and in "the channels for selling agricultural products."

The antitrust agencies under Assistant Attorney General Jonathan Kanter at the Department of Justice (DOJ) and Chair Lina Khan at the FTC have been vocal about their goals. Kanter stated in a keynote at the University of Chicago in April 2022: "I am here to declare that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun … We're not afraid to take big cases and we're not afraid to take on big companies."

Likewise, Khan warned in a keynote address to the International Competition Network in May that "competition law in the United States is currently in the midst of a broad and sweeping reassessment" and that "[r]eforms, potentially significant ones, are ahead." Most recently, in an early October Des Moines Register op-ed regarding the complaint against Corteva and Syngenta, Khan asserted: "This case fits into the FTC's broader mission to use our power to promote fair competition for all Americans – whether it's small businesses, independent farmers, or a mom or dad shopping for groceries."

Challenge to pesticide loyalty programs

The FTC's claim centers on vertical contracting practices between leading pesticide manufacturers and their downstream distributors, and specifically the impact that loyalty payments made by Corteva and Syngenta have on generic competitors.

US antitrust law recognizes that volume-based discounts are almost always lawful, and that loyalty discounts generally reduce prices for customers and therefore are often procompetitive. Loyalty discounts may be challenged, however, where a supplier has market power and adopts a program that forecloses competitors absent justification, typically as de facto exclusive dealing or under a predatory pricing rubric. Such loyalty programs may be subject to scrutiny where they go beyond encouragement to purchase goods or services and explicitly limit or prevent distributors from dealing with other suppliers, and there are not justifications for such conduct.

Here, the FTC alleges that Corteva and Syngenta promise distributors "a complex set of incentive payments," but condition the availability of such payments on the distributor limiting "purchases of comparable generic products to a set percentage share." The complaint further alleges that as there are only a "small number of large distributors [that] dominate the sale of crop-protection products in the United States," the "scheme almost entirely forecloses generic competitors from efficient distribution of their products."

The FTC repeatedly characterizes the conduct in terms of unlawful extension of the defendants' "patent monopolies," focusing on Corteva and Syngenta allegedly continuing to obtain monopoly profits after patent expiration. In doing so, the FTC places the conduct within its framework challenging conduct by pharmaceutical companies that delays or forecloses generic entry, through what are often called "pay-for-delay" settlements.

The FTC also borrows from its pharmaceutical precedents in defining the "relevant markets" at issue narrowly, contending that Corteva and Syngenta hold "monopoly power" in individual crop-protection products, each of which contains at least one active ingredient that had been patented. Such single-brand product markets are rare under US antitrust law, particularly following the US Supreme Court's 2006 *Independent Ink* decision that patents do not necessarily confer market power.

The FTC, however, has argued that price erosion following entry by generic pharmaceuticals is evidence that an active pharmaceutical ingredient may constitute a product market. The FTC echoes this framework in alleging that each pesticide active ingredient is a relevant market because generic entry would result in lower prices. These allegations are critical to the FTC's ability to plausibly allege its claims – and whether these pesticides instead compete in broader, differentiated product markets may be tested as the litigation unfolds.

What's next for businesses?

While the outcome of the litigation remains far from certain, we've highlighted three key considerations for businesses within and beyond the agricultural sector.

First, the complaint is a marker that the FTC remains committed to pursuing an aggressive enforcement agenda and is willing to test novel theories in litigation. We expect to see more non-merger investigations and enforcement out of the FTC and DOJ under the Biden administration. Indeed, the FTC's press release on the Corteva and Syngenta complaint foreshadows future enforcement in the pharmaceutical industry, asserting that "illegal rebates and kickback schemes to middlemen in the pharmaceutical industry" amount to "an anticompetitive tactic similar to the one alleged in today's complaint."

Second, the FTC's challenge to vertical agreements between manufacturers and their distributors serves as another reminder of this administration's enhanced concern about foreclosure of competitors and skepticism of efficiencies. We expect the FTC to continue to be on the lookout for cases where there may be a perception that dominant suppliers use contracting to foreclose or limit the ability for competitors to reach consumers.

In that regard, the complaint not only notably alleges violations of Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition," and Sections 1 and 2 of the Sherman Act, which prohibit "agreements in restraint of trade" and "monopolization," but also brings a stand-alone claim under Section 3 of the Clayton Act. Although Section 3 proscribes exclusive dealing and tying that substantially lessens competition, it is often considered coextensive with Section 1 of the Sherman Act. Whether the FTC uses the litigation as a vehicle to attempt to reinvigorate Section 3 is a development worth watching.

Third, the complaint underscores the Biden administration's focus on exclusionary conduct in agricultural supply and distribution. To the extent smaller competitors face barriers to competing that are artificially imposed by entrenched players, the time may be ripe for voicing those concerns to federal and state enforcers.

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Key Contacts

Julia R. Brinton Washington, DC	jrenehan@cooley.com +1 202 962 8364
David Burns Washington, DC	dburns@cooley.com +1 202 728 7147

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