GCR

US COURTS
ANNUAL REVIEW

THIRD EDITION

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-875-8

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Global Competition Review (GCR) is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to include the third iteration of the *US Courts Annual Review*, which takes a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the United States, allowing our valued contributors both to analyse important local decisions and to draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus brought to the surface, allowing readers to gain a comprehensive understanding of how judges from around the country are interpreting antitrust law, and its evolution. New for this digital-only third edition, the Review also includes exclusive data from Docket Navigator for the first time. In-depth tables drill down into the raw data – from average case duration to most popular courts – to give readers primary insights from the front line.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the United States, whose knowledge and experience have been essential in drawing together these developments. That team has been led and compiled by Rosanna McCalips and Peter Julian of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here.

We thank all the contributors, and the editors in particular, for their time and effort in compiling this report. Thanks also go to Paula W Render, formerly of Jones Day, as co-editor of the inaugural edition.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to GCR will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review
London
June 2022

Part 2

Court Decisions

First Circuit

Christopher T Holding and Brian T Burgess
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The past year saw a decrease in significant antitrust decisions within the First Circuit, as several long-standing cases wound down. Nevertheless, remaining class actions raising antitrust claims in the context of pharmaceuticals produced important decisions, both on matters of antitrust substance (e.g., market power and causation) and procedure (e.g., determining whether certain claims are subject to arbitration). Outside the pharmaceuticals context, decisions were issued in a variety of areas, ranging from challenges to real-estate brokerage commission rules alleged to have been collusive to challenges to cases assessing the extraterritorial reach of the Sherman Act.

Pharmaceutical competition

In re Ranbaxy Generic Drug Applications Antitrust Litigation (*Ranbaxy*) involves claims of competitive harm resulting from the delayed entry onto the market of generic versions of three brand-name drugs: Diovan, Nexium, and Valcyte. In recent years, many cases in the First Circuit and around the country have addressed antitrust claims concerning allegations of delayed generic entry, but *Ranbaxy* arises in a unique context. The plaintiffs allege – following actions taken by the US Food and Drug Administration (FDA) – that Ranbaxy submitted fraudulent abbreviated new drug applications (ANDAs), seeking to be the first ANDA filers for the products and to obtain the regulatory 180-day exclusivity for which first-filers can be eligible, which can be very valuable. The FDA initially awarded that exclusivity to Ranbaxy for the three products. Subsequent regulatory problems at Ranbaxy concerning its failure to comply with good manufacturing processes delayed Ranbaxy's ability to obtain final approval and launch its products, and Ranbaxy's receipt of exclusivity blocked other generics from selling as well. Following an investigation, the FDA ultimately revoked Ranbaxy's exclusivities, which opened the door for generic products to enter

the market. The plaintiffs in this matter, who are purchasers of drug products, allege that Ranbaxy's conduct was fraudulent and anticompetitive, causing them harm by delaying generic entry and forcing them to pay elevated prices.

In 2021, the district court in *Ranbaxy* ruled on the parties' motions for summary judgment, largely denying both sides' motions.[1] Although several different arguments were raised, three in particular merit note.

First, the court addressed causation. Ranbaxy argued that, although the plaintiffs' claims depend on proof that Ranbaxy defrauded the FDA, the plaintiffs could not meet their burden because certain letters that the FDA sent Ranbaxy following an audit stated that the three ANDAs at issue did not appear to contain any 'untrue statements of material fact' or 'data irregularities'. Ranbaxy asserted that these findings by the FDA prove that Ranbaxy's receipt of the regulatory exclusivities at issue were not induced by fraud. The court rejected Ranbaxy's argument on two grounds. First, it held, the plaintiffs in the private litigation had developed additional evidence of fraud that the FDA arguably had not considered. Second, and separately, the court held that the FDA's conclusion 'does not preclude the Court from making its own independent assessment' and the FDA letters 'cannot conclusively disprove causality'.[2]

Second, the court addressed monopoly power. Ranbaxy argued that it could not have monopoly power as to either generic Valcyte or generic Nexium, because it had never sold either product and so could not have maintained a significant share in either relevant market. The court disagreed, holding that the plaintiffs could show monopoly power without relying on market share. The court held that a 'holistic assessment' supported an argument that Ranbaxy had monopoly power 'due to its first-filer status and the resulting exclusivity periods'.[3] As to Diovan, which Ranbaxy did sell, it argued that it sold at all times in competition with the brand product and an authorized generic, and so could not charge monopoly prices or retain a monopoly share. The court refused to grant summary judgment on this argument, too, on the basis that the plaintiffs had presented 'compelling, though disputed, evidence that Ranbaxy charged super-competitive prices'.[4]

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1 *In re Ranbaxy Generic Drug Application Antitrust Litigation*, --- F.Supp.3d ---, 2021 WL 5493675 (D. Mass. Nov. 22, 2021).

2 *Id.* at 13, 14.

3 *Id.* at 18.

4 *Id.* at 20.

Third, the court addressed an issue of standing. Certain plaintiffs argued that they suffered injury from paying elevated prices for brand products. Ranbaxy argued that the plaintiffs had no antitrust standing to seek damages from brand prices because the plaintiffs' experts had defined the relevant markets as being limited to AB-rated generic products. Here, too, the court denied summary judgment, pointing to evidence proffered by the plaintiffs that the lack of generic competition and the resulting reduction in 'competitive pressure' had allowed brand manufacturers to charge higher prices. Although the plaintiffs' expert concluded that cross-price elasticity between the brands and generics is low, the court noted that '[l]ow is not . . . the same as nonexistent'. Therefore, although these claimed injuries 'rest upon transactions outside the generic markets in which Ranbaxy participated', the court held, Ranbaxy's challenged behavior 'may still have caused damages to these plaintiffs'.[5]

Arbitration and class actions

In re Intuniv Antitrust Litigation[6] addressed two recurring questions about who decides whether an agreement empowers a party to compel arbitration. The questions arose in the context of a case involving claims by various purchasers challenging a patent settlement agreement reached by Shire and Actavis concerning the drug Intuniv. The court had previously certified a class of direct purchasers and appointed FWK Holdings LLC (FWK) as the sole class representative. Based on subsequent events, however, the court later ruled that FWK could no longer serve in that role, leaving the class certified but without a named representative. Meijer, another member of the class, moved to intervene and to be appointed as the new class representative.

Actavis had two agreements with Meijer that required Meijer to arbitrate the claims at issue in the case, but the class and Actavis settled before Actavis submitted a demand to arbitrate. Shire then opposed Meijer's intervention motion and moved to compel arbitration of Meijer's claims against it. Shire relied on Actavis's now-settled arbitration agreement with Meijer, asserting that Shire was entitled to the benefit of the Actavis-Meijer arbitration agreement based on principles of equitable estoppel.

The court first addressed which forum should decide whether Shire had a right to compel arbitration: the court or an arbitration panel. The court noted that the arbitration agreement contained an express delegation of authority to the arbitration panel to determine the question of the arbitrability of those claims, by incorporating the

5 *Id.* at 22.

6 *In re Intuniv Antitrust Litigation*, 2021 WL 517384 (D. Mass. Feb. 11, 2021).

Commercial Arbitration Rules of the American Arbitration Association. Under those Rules, the arbitration panel would decide whether the claims were arbitrable. The court also recognized, however, a split in authority about whether such a delegation applies when the party seeking to compel arbitration is not itself a signatory to the arbitration agreement. Lacking clear controlling authority, the court said, it would follow the line of cases respecting the decision of the parties to delegate the question of arbitrability to the arbitrator.

The court then addressed Meijer's argument that Shire had waived any right to arbitration by waiting too long to file its motion to compel. The court initially held as a threshold matter that the question whether Shire had waived was for the court to decide, not an arbitrator. The court then applied a multi-factor test to conclude that Shire had not waived, relying largely on the fact that Shire promptly sought to compel arbitration once it became aware of the arbitration agreement, even though the litigation had already proceeded for years.

Based on the foregoing, the court granted the motion to compel arbitration on the threshold dispute about arbitrability and stayed the class proceedings until that issue was resolved.

Consumer class action challenging real estate commission practices

In *Nosalek v MLS Property Information Network, Inc*,[7] a district court denied a motion to dismiss in a putative antitrust class action directed against the owner of a real estate listing website – MILS Property Information Network, Inc (MILS PIN), an association of realtors that operates the website 'Pinergy'– and several large real estate brokers. The plaintiffs brought claims under Section 1 of the Sherman Act,[8] alleging that MILS PIN and the brokers had conspired to artificially inflate the commissions paid to buyer brokers in real estate sales through adoption of the Buyer-Broker Commission Rule (the Commission Rule), which governed all listings on Pinergy. Under the Commission Rule, seller brokers posting a property on Pinergy must offer a blanket commission to any broker who obtains a buyer for the property. The plaintiffs allege that the Commission Rule incentivizes sellers to set higher buyer-broker commissions to induce buyer-brokers to show their homes to potential buyers, which results in buyers paying inflated commissions.

7 No. 20-cv-12244, 2021 WL 5868252 (D. Mass. Dec. 10, 2021).

8 15 U.S.C. § 1.

The defendants moved to dismiss the claims on two grounds relating to causation, both of which the district court rejected. First, the defendants argued that the plaintiffs had not adequately alleged causation from the Commission Rule on the ground that it merely codified existing industry practices that would continue to exist even without a rule. The district court rejected that argument, holding that because the Commission Rule 'requires listing brokers to specify the commission amount in their listings', it was plausible to infer that it 'force[s] listing brokers to provide for substantial commissions in order to avoid being screened by buyer brokers'.[9] Second, the defendants disputed whether the Commission Rule actually causes commissions to be artificially inflated. The court rejected that argument, relying on two out-of-circuit decisions that had held that the Commission Rule could plausibly cause buyer brokers to steer home purchasers to properties with higher commissions, which would in turn cause commissions to be artificially inflated.[10]

Separately, the district court also rejected the real estate broker defendants challenge to the sufficiency of the plaintiffs' conspiracy allegations. The court held that the complaint had plausibly alleged that the defendants had joined the conspiracy by requiring their franchisees to join MLS PIN, and thus to follow the Commission Rule. In addition, one of the defendants was represented on the MLS PIN board of directors by at least one realtor from a related franchise. As with its analysis above, the district court supported its decision by reference to the out-of-circuit decisions that had previously denied similar motions to dismiss.[11]

Limits on the Sherman Act's extraterritorial application

The decision in *Sensitech Inc v Limestone FZE*[12] grows out of a contractual dispute about a distributor agreement. Sensitech, a Delaware company based in Massachusetts, contracted with LimeStone FZE, a company incorporated and based in Dubai, to distribute Sensitech's products throughout the United Arab Emirates and Saudi Arabia. The business relationship soured, with Sensitech filing suit against both LimeStone and LimeStone's owner for, among other things, failure to pay and the

9 2021 WL 5868252, at *4.

10 *Id.* at *5 (citing *Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020) (*Moehrl*), and *Sitzer v. Nat'l Ass'n of Realtors*, 420 F. Supp. 3d 903 (W.D. Mo. 2019) (*Sitzer*)).

11 *Id.* at *6 (citing *Moehrl*, 492 F. Supp. 3d at 778, and *Sitzer*, 420 F. Supp. 3d at 912).

12 548 F. Supp. 3d 244 (D. Mass 2021).

misappropriation of confidential business information. The defendants answered and filed numerous counterclaims, including one count alleging violations of the Sherman Act. The plaintiffs moved to dismiss this counterclaim count under the Foreign Trade Antitrust Improvements Act of 1982,[13] which generally removes from the reach of the Sherman Act both 'export activities', and 'other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States'.[14] The district court granted the Sensitech motion, concluding that the defendants had not plausibly alleged that Sensitech's conduct had adversely impacted domestic trade or commerce; to the contrary, the defendants had only allegedly caused injuries to LimeStone (a Dubai corporation with a network of customers in the Middle East).

State unfair competition law

In *Anoush Cab, Inc v Uber Techs, Inc*,[15] the First Circuit affirmed a district court judgment finding that ride-share company Uber Technologies, Inc had not violated state-law prohibitions on unfair competition by operating in the City of Boston before Massachusetts enacted legislation in 2016 formally authorizing its services. The plaintiffs in the action were companies that leased taxicabs and their medallions in Boston. They alleged that Uber's unlicensed competition before its services had been expressly legally authorized violated statutory and common law prohibitions on unfair competition. Following a bench trial, the district court ruled in favor of Uber, finding, among other things, that Uber had not committed 'an extreme or egregious wrong' through its operation, because it had 'acted in accordance with the standard of the commercial marketplace' during a period of 'regulatory ambiguity'.[16] The First Circuit found no clear error.

In its decision, the First Circuit concluded that even if Uber's rides had violated Boston taxicab regulations before formal authorization by the Massachusetts legislature, those regulatory infractions did not qualify as unfair competition under Massachusetts General Law Chapter 93A since Uber's communications and dealings with City officials reflected 'both affirmative and tacit' approval of Uber's launch and

13 15 U.S.C. § 6a.

14 *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004).

15 8 F.4th 1 (1st Cir. 2021).

16 *Id.* at 14, 20.

continued operations.[17] The First Circuit also upheld the district court's rejection of the plaintiffs' unfair competition claim under common law on the ground that the plaintiffs had not shown that the taxicab regulations that Uber had allegedly violated were enacted to protect against unauthorized competition. To support that conclusion, the First Circuit relied on a decision from the Supreme Judicial Court of Massachusetts, which described the regulatory purpose behind the taxicab laws as promoting 'public convenience and necessity', not restricting competition.[18]

17 *Id.* at 21.

18 *Id.* at 23–24 (citing *Town Taxi Inc. v. Police Comm'r of Bos.*, 377 Mass. 576, 387 N.E.2d 129 (1979)).

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Christopher Holding is a partner in Goodwin's antitrust and competition practice, litigation department and is a member of the firm's life sciences disputes group. Mr Holding has particular expertise in issues involving the intersection of antitrust and intellectual property. He has litigated cases in federal and state courts throughout the country and has defended federal and state investigations.

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Mr Holding has been recognized in *Chambers USA: America's Leading Lawyers for Business*, *The Legal 500 United States*, *Benchmark Litigation*, and Global Competition Review's *GCR 100*. Mr Holding received his JD, *magna cum laude*, from Harvard Law School and his BA, *summa cum laude*, from Princeton University.

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Mr Burgess is recognized in *Chambers USA: America*'s *Leading Lawyers for Business* as an 'Up and Coming' attorney in the Nationwide Appellate Rankings, where he is noted in particular for 'expertise in advising life sciences clients in disputes work'. Clients laud Mr Burgess for providing 'timely and helpful advice across a variety of issues' and describe him as 'a tremendous up-and-coming litigator' with 'the unique skill of taking complicated controversial topics and making them simple, understandable and logical'. Mr Burgess has also been named to *Benchmark Litigation*'s '40 and Under Hot List' for five consecutive years (from 2017 to 2021), and is a recommended lawyer for appellate by *The Legal 500*. In 2020, Mr Burgess was named a 'DC Rising Star' by the *National Law Journal*.

Prior to joining Goodwin, Mr Burgess served as a law clerk to Associate Justice Sonia Sotomayor of the Supreme Court of the United States. He previously worked in the Department of Justice as a special assistant to the Solicitor General. Mr Burgess received his JD, *summa cum laude*, from New York University and his AB, *summa cum laude*, from Dartmouth College.

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ISBN 978-1-83862-875-8