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Media and Technology Committee
ABA Section of Antitrust Law

Summer 2022

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AMERICAN BAR ASSOCIATION
Antitrust Law Section

#95938321v2

icarus
Summer 2022

Committee Leadership

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From the Editors

The Media and Technology Committee of the ABA Section of Antitrust Law is pleased to present the Summer 2022 issue of *icarus*, our publication focusing on competition and consumer protection issues in media and technology industries.

In this issue, we continue our practice of publishing in depth articles exploring issues related to antitrust in media and technology industries and interviewing prominent members of the Section. We begin by exploring FTC challenges to transactions in the biotechnology sector in an article by Allison B. Smith and Jordanne M. Steiner – *Challenges to Acquisitions of Nascent Competitors in Biotech*. Next, we dive into the history of vertical merger enforcement and an evaluation of various presumptions that could be used to identify anticompetitive vertical mergers in an article by Tirza J. Angerhofer – *Vertical Merger Antitrust Enforcement: The Past, the Present, and the Future.*

We are then pleased to offer the second installment of our interview series – *Frequency Boost: Amplifying Diverse Voices in Media & Technology*. We speak with two accomplished e-discovery practitioners and a patent lawyer to get their perspectives on technology issues that should be relevant to every antitrust lawyer.

We want to extend a heartfelt thanks to Estefania Torres Paez for her insightful comments and review of the articles and to Vinny Venkat for his editing, cite checking, and proofreading of the articles for this edition.

We hope you enjoy this edition, and any prospective authors interested in appearing in future editions should email the editors.

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Challenges to Acquisitions of Nascent Competitors in Biotech

Authored by Allison B. Smith and Jordanne M. Steiner[1]

Antitrust enforcement agencies, antitrust practitioners, Congress, and the public press are having a vibrant discourse on acquisitions of nascent competitors by "Big Tech" companies, and whether the agencies are aggressive enough in their enforcement actions. The Federal Trade Commission (FTC), however, has been active in investigating and challenging potential competition cases in the biotechnology sector for some time.

One recent study by FTC personnel identified 82 cases from the last 25 years where the FTC challenged proposed or consummated transactions on a theory of harm to future competition.[2] Forty-eight of the cases (59 percent) were in the pharmaceuticals sector, and 15 cases (18 percent) were in medical devices, equipment, and tests. Only three were classified as technology and software.

The FTC's attention to biotech deals continues. In 2020, when the Commission issued Special Orders to five large technology firms for information on prior acquisitions not reported under the Hart-Scott-Rodino Act,[3] FTC Commissioners Christine Wilson and Rohit Chopra called for a retrospective of non-reportable transactions in the healthcare industry.[4] The Commissioners noted that "non-reportable deals involving technology companies garner significant attention," but the healthcare industry, including pharmaceuticals and hospitals, also have seen patterns of consolidation through non-reportable deals.[5]

Acquisitions of potential competitors in the biotech sector is a natural focus given the FTC's expertise in healthcare and the potential impact of innovative products on consumers' well-being and wallets. The highly innovative sector involves large upfront R&D expenditures, creating barriers to entry and possibly raising concentration concerns. And biotech acquisitions may involve more readily definable relevant product markets since they often involve specialized technology with specific applications or uses. These features make competing products easier to identify (and prove) than, for example, technology platforms.

To illustrate, in the first case example below, the relevant product market was "U.S. left ventricular assist device[s]," which "replac[e] the function of the left ventricle" and provide "full circulatory support for end-stage heart failure patients" after all other treatment options "have been exhausted."[6] Compare that to the FTC's definition of a relevant market in *Federal Trade*

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[1] Allison B. Smith and Jordanne M. Steiner are associates in the Washington, D.C., office of Wilson Sonsini Goodrich & Rosati. The opinions expressed are those of the authors and do not necessarily reflect the views of the firm or its clients.

[2] Alison Oldale, Bilal Sayyed & Andrew Sweeting, A Review of Cases Involving the Loss of Potential and Nascent Competition at the FTC, with Particular Reference to Vertical Mergers, 6 COMPETITION L. & POL'Y DEBATE 60 (Dec. 2020). The sample is necessarily underinclusive because it includes only cases with sufficient information available in the public record.

[3] Press Release, Fed. Trade Comm's, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[4] Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

[5] *Id.*

[6] Administrative Complaint ¶¶ 1, 14, *In re Thoratec Corp. & HeartWare Int'l, Inc.* (FTC July 30, 2009).

Commission v. Meta Platforms, Inc.: "personal social networking services," defined as "online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space," and distinct from (i) mobile messaging services, (ii) specialized social networking services, (iii) online services that focus on the broadcast or discovery of content based on users' interests, and (iv) online services focused on video or audio consumption.[7]

Acquisition prices that fall under HSR notification thresholds provide another rationale for the FTC's activity in this area. Given the high initial investments, new products are often high risk / high reward endeavors. Emerging biotech companies may seek to be acquired by larger companies with existing clinical testing abilities and the scale needed to commercialize a new product. Early-stage valuations may make the deal non-reportable.

While the high risk / high reward structure of the industry may explain the FTC's attention, it also complicates the competitive analysis. Gauging the competitive effect of a potential entrant is difficult and made even more so by the complex product development process in biotech. While product development continues in the lab, the product must continue to present a viable business case. Biotech products need to undergo clinical trials and gain U.S. Food and Drug Administration (FDA) approval, both expensive and uncertain.

If approved to launch from a business and regulatory standpoint, the product still needs to gain market acceptance to have any competitive impact on the relevant market. Each step carries uncertainty, making the regulators' job particularly difficult when trying to predict the competitive impact of a product in development. Though the FTC seeks to protect potential competition "even when a potential entrant faces regulatory hurdles on the path to entry,"[8] regulatory uncertainty has to enter the equation.

The FTC's "actual potential entrant" doctrine requires four elements: "(1) the relevant market is highly concentrated, (2) the competitor 'probably' would have entered the market, (3) its entry would have had pro-competitive effects, and (4) there are few other firms that can enter effectively."[9] Four examples are particularly illustrative of potential competition cases in the biotechnology sector:

Thoratec Corp. / HeartWare International, Inc.

In July 2009, the FTC filed an administrative complaint challenging the proposed acquisition of HeartWare International, Inc. by Thoratec Corporation.[10] The FTC alleged that HeartWare was "the one company poised to seriously challenge Thoratec's monopoly of the U.S.

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[7] Substitute Amended Complaint ¶¶ 166, 172-75, *Fed. Trade Comm'n v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.D.C. Sept. 8, 2021).

[8] Organisation for Economic Co-operation and Development, Global Forum on Competition, Merger Control in Dynamic Markets, Contribution from the United States (Dec. 6, 2019), https://one.oecd.org/document/DAF/COMP/GF/WD(2019)32/en/pdf.

[9] Fed. Trade Comm'n v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015).

[10] Administrative Complaint, *Thoratec Corp. & HeartWare Int'l, Inc.* (FTC July 30, 2009).

left ventricular assist device ('LVAD') market."[11] Thoratec had the only two LVADs commercially available, and HeartWare was one of a few potential competitors with FDA approval to sell limited amounts of its device under an Investigational Device Exemption.[12]

The parties argued the merger would provide a broader portfolio of products and complementary product development capabilities for Thoratec, given HeartWare's R&D focus. HeartWare would benefit from Thoratec's existing support infrastructure and financial support while HeartWare approached a full market release.[13]

The FTC alleged that HeartWare's device was the next LVAD expected to be approved for commercial sale by the FDA and that its novel design would provide superior performance to Thoratec's devices.[14] The FTC argued HeartWare would "rapidly erode" Thoratec's monopoly following FDA approval while other companies working on LVADs likely would not be able to challenge Thoratec.[15]

The day after the complaint was filed in 2009, the parties abandoned the transaction. In 2012, HeartWare received FDA approval for its device. Medtronic acquired HeartWare in 2016 and pulled the HeartWare device from the market in June 2021 due to safety concerns.[16] No other LVADs have entered, leaving only Thoratec's products.[17]

Steris Corp. / Synergy Health PLC

On May 29, 2015, the FTC issued an administrative complaint challenging Steris Corp.'s proposed $1.9 billion acquisition of Synergy Health PLC.[18] The two companies were the second- and third-largest sterilization companies in the world.

Steris was one of two companies providing gamma sterilization services in the United States. Synergy had electron-beam radiation facilities in the U.S. and planned to open x-ray sterilization facilities. The FTC alleged that electron-beam radiation sterilization was not cost-effective for many products that undergo gamma sterilization, but x-ray sterilization was expected to be a close substitute.[19] No company offered x-ray sterilization in the U.S. at the time.

Four months after the merger was announced and while the FTC was still investigating, Synergy discontinued the U.S. x-ray project. The FTC alleged the merger caused Synergy to

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[11] *Id.* ¶ 1.

[12] *Id.* ¶ 2.

[13] Julie Zeveloff, *FTC Seeks More Info on Thoratec, HeartWare Merger*, LAW360 (Mar. 27, 2009), https://www.law360.com/articles/94170.

[14] *Id.* ¶ 3.

[15] *Id.* ¶¶ 3, 18.

[16] Press Release, Medtronic, Medtronic to Stop Distribution and Sale of HVAD System (June 3, 2021), https://news.medtronic.com/2021-06-03-Medtronic-to-Stop-Distribution-and-Sale-of-HVAD-TM-System.

[17] Ricky Zipp, *Medtronic's HeartWare HVAD ending brings questions about $1B acquisition*, MEDTECH DIVE (June 8, 2021), https://www.medtechdive.com/news/medtronics-heartware-hvad-ending-brings-questions-about-1b-acquisition/601452/.

[18] Complaint, Steris Corp. and Synergy Health PLC, No. 9365 (FTC May 28. 2015), https://www.ftc.gov/system/files/documents/cases/150529sterissynergypart3cmpt.pdf.

[19] *Id.* ¶¶ 4-5.

abandon the project and accordingly would reduce future competition for radiation sterilization of medical products.[20]

Simultaneously with the administrative complaint, the FTC filed a complaint for a temporary restraining order and preliminary injunction in federal court. The district court denied the preliminary injunction, finding that Synergy discontinued its U.S. x-ray sterilization project because of a lack of customer commitments (mainly due to the high cost of switching their products from gamma to x-ray sterilization and obtaining new regulatory approvals) and significant capital costs to build the facilities. In short, the FTC did not show that Synergy would have launched the competing x-ray sterilization technology in the U.S. absent the acquisition.[21]

The Commission did not appeal the denial of a preliminary injunction and subsequently voted to dismiss the administrative complaint.[22] Steris and Synergy completed the acquisition on November 2, 2015.[23] In the years since, companies such as Steri-Tek[24] have developed and marketed x-ray sterilization procedures in the United States.

Mallinckrodt / Synacthen Depot

On January 18, 2017, the FTC filed a complaint against Mallinckrodt ARD Inc. (formerly Questcor Pharmaceuticals) and parent company Mallinckrodt plc, alleging Mallinckrodt illegally monopolized the market for therapeutic adrenocorticotropic hormone (ACTH) drugs used to treat infantile seizures. Questcor sold H.P. Acthar Gel, the only ACTH available in the U.S., and had increased its price by 85,000 percent since acquiring Acthar from Aventis in 2001.[25]

In June 2013, Questcor acquired the U.S. rights to Synacthen Depot, a synthetic ACTH drug, from Novartis AG. Synacthen was, at the time, used similarly to Acthar in other parts of the world. The FTC alleged Questcor acquired the U.S. rights to Synacthen to prevent another bidder from developing and launching the drug in the U.S., which would challenge Questcor's monopoly over ACTH drugs.[26] Mallinckrodt subsequently acquired Questcor in 2014, changing its name to Mallinckrodt ARD.[27]

Simultaneously with the complaint in January 2017, the parties filed a Joint Motion for Entry of Stipulated Order for Permanent Injunction and Equitable Monetary Relief, under which Mallinckrodt agreed to grant a limited sublicense to commercialize Synacthen in the U.S. for

[20] Fed. Trade Comm'n v. Steris Corp., 133 F. Supp. 3d 962, 977-78 (N.D. Ohio 2015).

[21] *Id.* at 978-83.

[22] Order Returning Matter to Adjudication and Dismissing Complaint, Steris Corp. and Synergy Health PLC, No. 9365 (FTC Oct. 30, 2015).

[23] Press Release, Steris, Steris PLC Completes Acquisition of Synergy Health PLC (Nov. 2, 2015), https://www.steris-ast.com/steris-plc-completes-acquisition-synergy-health-plc.

[24] Steri-Tek Expert Sterilization Services, https://www.steri-tek.com/ (last visited May 31, 2022).

[25] Complaint ¶¶ 1-2, *FTC v. Mallinckrodt*, No. 1310172 (FTC Jan. 25, 2017), https://www.ftc.gov/system/files/documents/cases/170118mallinckrodt_complaint_public.pdf.

[26] *Id.* ¶¶ 6, 8.

[27] *Id.* ¶ 12.

certain uses. It also agreed to pay $100 million in fines, but did not admit culpability.[28] By mid-2018, the price of a vial of Acthar had risen by $7,000 since Mallinckrodt acquired Questcor in 2014, and by 97,000 percent since Mallinckrodt acquired Acthar in 2001.[29] Synacthen Depot does not appear to be available in the U.S. to treat infantile seizures.

Illumina Inc. / Pacific Biosciences of California, Inc.

In December 2019, the FTC filed an administrative complaint challenging Illumina Inc.'s proposed $1.2 billion acquisition of Pacific Biosciences of California, Inc ("PacBio").[30] The FTC alleged that Illumina, the leader in DNA sequencing and next-generation sequencing in the U.S., sought to acquire PacBio to "extinguish it as a competitive threat."[31]

PacBio offered a DNA sequencing system that had some benefits over Illumina's technology but was more expensive. The FTC alleged recent technological improvements made PacBio's long-read sequencing system a closer alternative to Illumina's short-read technology, and that PacBio marketed the system as a closer competitor to Illumina.[32] The FTC alleged Illumina had a market share of over 90 percent and that only three other companies manufactured next-generation sequencing products, but their products were not substitutes.[33]

Less than a month after the complaint, the parties abandoned the transaction.[34] As of 2019, Illumina remained the largest player in the next-generation sequencing market in the United States, but Thermo Fisher Scientific Inc. and Oxford Nanopore Technologies, mentioned in the FTC Complaint, remain in the U.S. market along with PacBio. F. Hoffman-La Roche Ltd. has also emerged as a significant player.[35]

Conclusion

While estimating the competitive effect of a potential entrant is difficult, the FTC is willing to challenge deals it views as eliminating a nascent competitor. As these examples demonstrate, the FTC has been largely successful in these challenges, prevailing on three out of the four discussed above. Yet the examples also illustrate the difficulty of the competitive analysis, particularly the last two elements of the FTC's actual potential entrant doctrine: the target's entry would have had procompetitive effects and few other firms can enter effectively.

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[28] Joint Motion for Entry of Stipulated Order for Permanent Injunction and Equitable Monetary Relief, *FTC v. Mallinckrodt*, No. 1310172 (FTC Jan. 18, 2017), https://www.ftc.gov/system/files/documents/cases/2_joint_motion_for_entry_of_stipulated_order.pdf.

[29] Wayne Drash, *Anatomy of a 97,000% drug price hike: One family's fight to save their son*, CNN (June 29, 2018 3:15 PM) https://www.cnn.com/2018/06/29/health/acthar-mallinckrodt-questcor-price-hike-trevor-foltz/.

[30] Complaint, *Illumina Inc. and Pacific Biosciences of Cal. Inc.*, No. 9387 (FTC Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf. Wilson Sonsini represented Pacific Biosciences of California, Inc. in this matter.

[31] *Id.* ¶ 8.

[32] *Id.* ¶¶ 5-6, 20-21.

[33] *Id.* ¶¶ 34, 47-48.

[34] Press Release, Pac. Biosciences, Illumina and Pacific Biosciences Announce Termination of Merger Agreement (Jan. 2, 2020), https://www.pacb.com/press_releases/illumina-and-pacific-biosciences-announce-termination-of-merger-agreement/.

[35] Next-Generation Sequencing (NGS) Market Size, Share and Industry Analysis by Type (July 2019), *available at* https://www.fortunebusinessinsights.com/industry-reports/next-generation-sequencing-ngs-market-101000.

For HeartWare and Synacthen Depot, the market looks much the same as it did before. HeartWare's product did gain regulatory approval and enter the market, but was removed due to safety concerns. Thoratec remains the only player in the defined market. The FTC approved the sublicense to commercialize Synacthen in the United States for infantile spasms to West Therapeutic Development, LLC six months after the stipulated order.[36] We have not determined that this sublicense has resulted in commercialization of Synacthen in the U.S. for infantile spasms, and the price of Mallinckrodt's drug continued to increase after the settlement.

In contrast, other competitors have entered the relevant market since the FTC lost its challenge to the Steris Corp. / Synergy Health acquisition. And while PacBio remains an alternative to Illumina after the FTC's successful challenge, other companies now also offer similar products.

These are high-profile matters where the FTC publicly challenged the transaction and do not necessarily reflect the FTC's enforcement decisions in other biotech-related transactions. Nonetheless, they illustrate the basic analysis and are instructive for evaluating antitrust risk. Counsel should consider this theory of harm in a biotech transaction, including a non-reportable deal, involving an acquirer that is the only, or virtually only, participant in the relevant market (assuming the FTC's market definition); the target company is on the cusp of entering or has already entered the relevant market; and there are significant barriers, including intellectual property and regulatory structures, impeding rapid entry by another competitor.

[36] Press Release, FTC, FTC Approves Sublicense for Synacthen Depot Submitted by Mallinckrodt ARD Inc. (July 14, 2017), https://www.ftc.gov/news-events/news/press-releases/2017/07/ftc-approves-sublicense-synacthen-depot-submitted-mallinckrodt-ard-inc.

Vertical Merger Antitrust Enforcement: The Past, the Present, and the Future

Authored by Tirza J. Angerhofer*

Introduction

Vertical merger enforcement has seen major upheaval in the past few years. In 2020, the U.S. antitrust agencies (the Agencies) replaced the severely outdated 1984 Non-Horizontal Merger Guidelines to reflect a new wave of literature on raising rivals' costs and market foreclosure. One year later, the Federal Trade Commission (FTC) unilaterally withdrew these 2020 Vertical Merger Guidelines and announced its intentions to replace them with even stricter ones.[1] In what follows, I provide a broad overview of the history of vertical merger enforcement and the current economic theory on vertical integration in order to evaluate various presumptions that have been proposed in the literature that the Agencies could use to identify anticompetitive vertical mergers.

Neither economic theory nor empirical evidence provide a clear answer on how to evaluate vertical mergers, since it is generally accepted that these mergers can be both procompetitive and anticompetitive. However, certain features of a vertical merger may signify a higher likelihood of anticompetitive effects. For example, it is well-established that vertical mergers that occur in competitive industries are generally driven by efficiencies.[2] On the other hand, when at least one of the firms merging has market power, raising rivals' costs and foreclosure become more likely.[3]

Introducing legal presumptions, which would "[identify] certain practices as presumptively illegal," would make vertical merger enforcement more stable and efficient since it would provide clear guidelines and simplify merger review.[4] Effective presumptions would balance the aims of eliminating anticompetitive mergers and minimizing the number of beneficial mergers that are eliminated. In this article, I argue that although the proposed presumptions have identified promising practices that often lead to anticompetitive outcomes, there is not enough empirical evidence to indicate that these presumptions effectively avoid

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[1] Federal Trade Commission, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines*, 7 (2021). Available at: https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf. In the majority statement concerning the withdrawal of the Guidelines, the FTC criticized the 2020 Guideline's discussion of procompetitive efficiencies, especially the elimination of double marginalization, and expressed a desire to expand the harms discussed to "consider various features that often characterize firms in the modern economy, including in digital markets." The FTC will also consider merger effects on labor markets.

[2] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 662-63 (2007).

[3] Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12, 16 (2019).

[4] Federal Trade Commission, *Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines,* 5 (2021). Available at: https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

eliminating beneficial mergers. Thus, more Agency experience in litigating vertical mergers and strong empirical evidence is needed to support the proposed presumptions.

Brief History of Vertical Merger Enforcement[5]

Vertical merger policy has cycled between periods of light and heavy enforcement. Before the 1950 Clayton Act Amendments, vertical merger cases were tried under the Sherman Act and few cases were litigated.[6] Driven by a "fear of what was considered to be a rising tide of economic concentration in the American economy," Congress passed the 1950 Clayton Act amendments.[7] As part of these amendments, Section 7 of the Clayton Act was extended to vertical mergers. Thus, vertical mergers that would "tend to substantially lessen competition" could now be challenged.[8]

In response, the Court of the 1960s shifted to strict vertical merger enforcement, interpreting the Clayton Act amendments to be "intended to reach incipient monopolies and trade restraints outside the Sherman Act."[9] On the basis that a series of mergers could have a cumulative effect, the Court blocked several relatively harmless mergers. In doing so, it employed often erroneous rationale such as condemning procompetitive mergers involving players with small market shares or those involving procompetitive efficiencies that the Court feared would disadvantage rivals.[10] In *Brown Shoe*, for example, the Court enjoined a merger between a shoe retailer and shoe producer in unconcentrated markets based on this reasoning.[11]

In contrast, in the 1970s the Court shifted to a consumer welfare standard approach and considered not just potential anticompetitive effects, but also the benefits of vertical merger efficiencies.[12] With an emphasis on efficiencies, vertical mergers were considered to be essentially harmless, especially by scholars associated with the Chicago School, which heavily influenced government policy at the time.[13] The 1984 Non-Horizontal Merger Guidelines, which were replaced by the 2020 Vertical Merger Guidelines, are a reflection of these views.[14]

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[5] For a detailed discussion of the history, see ROGER D. BLAIR AND DAVID L. KASERMAN, ANTITRUST ECONOMICS 341-357 (2nd Ed. 2009).

[6] A few vertical integration cases were tried under the Sherman Act. These include United States v. Yellow Cab, 322 U.S. 218 (1947); United States v. Paramount Pictures, 334 U.S. 131 (1948); United States v. New York Great Atlantic & Pacific Tea Co., 67 F.Supp. 626 (E.D. Ill. 1946).

[7] Brown Shoe Co. v. United States, 370 U.S. 294, 315-316 (1962).

[8] 15 U.S.C. §18.

[9] *Brown Shoe Co.*, 370 U.S. at 318.

[10] Herbert Hovenkamp, *Competitive Harm from Vertical Mergers,* 59 REV. IND. ORGAN. 139, 143 (2021).

[11] *Brown Shoe Co.*, 370 U.S. at 344-345. Note that the shoe retailer also produced shoes and the shoe producer also distributed shoes, so there were horizontal aspects to the case. *See also* Herbert Hovenkamp,*supra* note 10, at 143.

[12] Francine Lafontaine & Margaret Slade, *Presumptions in Vertical Mergers: The Role of Evidence*, 59 REV. IND. ORGAN. 255 (2021).

[13] Herbert Hovenkamp, *supra* note 10, at 144 (2021). The Chicago school of economics is a neoclassical school of thought that began at the University of Chicago. The main tenet is that free markets allocate scarce resources efficiently and government intervention should be minimal.

[14] U.S. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, MERGER GUIDELINES (1984), https://www.justice.gov/archives/atr/1984-merger-guidelines.

Economic scholarship in the late 1980s and early 1990s that introduced models of exclusion, entry deterrence, foreclosure, and raising rivals' costs again raised concerns about the proper treatment of vertical mergers. These concerns were slowly incorporated into merger enforcement and were present in the 2020 Vertical Merger Guidelines, which were later withdrawn by the FTC.[15]

Starting in the late 2010s, concern for anticompetitive behavior by technology giants such as Google, Amazon, and Facebook, as well as rising healthcare costs have attracted more attention to antitrust. Capitalizing on this momentum, the Biden Administration appointed a number of Big Tech critics to the Agencies who advocate for stricter enforcement of antitrust policy, including with respect to vertical mergers.[16] Although new vertical merger guidelines have not yet been released, it is likely that any new guidelines will be stricter than those published in 2020 given the views of the new administration.

Overview of the Vertical Merger Literature

Economists have studied vertical mergers for decades and the field has advanced significantly since the 1960s when the Court decided the *Brown Shoe* case. The current economics literature on vertical mergers calls for balance in enforcement since both the theory and empirical evidence suggest that vertical mergers can have both procompetitive and anticompetitive effects.

The literature points to two substantial benefits of vertical integration. First, there is elimination of double marginalization which occurs when an upstream and downstream firm with market power merge. Before integration, the downstream firm pays a markup on the upstream firm's good that it considers when setting prices. By merging, the firms have an incentive to reduce price since doing so stimulates demand. Essentially, double marginalization is a pricing externality. By integrating, the firms can align their incentives and remove the double marginalization. This increases quantity and leads to lower prices for consumers. Elimination of double marginalization is not merger specific since firms can employ various contracts that eliminate double marginalization. But vertical integration may be efficient if it reduces costs associated with creating and maintaining a contract.[17]

Second, vertical integration can reduce the merging firms' transaction costs. In some cases, substantial search and bargaining costs may be incurred with transactions between two firms. Through integration, these costs are eliminated, leading to increased efficiencies which lower costs and increase social welfare. For example, vertical integration may "streamline production, inventory management, or distribution."[18] As a result of a manufacturer merging with a wholesaler, for example, the merged entity would be better able to respond to changes in

[15] For a list of vertical merger actions from 1994-2020 see Salop and Culley, *Vertical Merger Enforcement Actions: 1994-April 2020*, SSRN 2684107 (2020).

[16] Greg Ip, *Antitrust's New Mission: Preserving Democracy, not Efficiency*, WALL ST. J. (2021), https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424.

[17] Tirza J. Angerhofer & Roger D. Blair, *Successive Monopoly, Bilateral Monopoly, and Vertical Mergers*, 59 REV. IND. ORGAN. 343 (2021).

[18] U.S. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, *supra* note 14.

consumer demand and would also be able to eliminate markups between the manufacturer and wholesaler. Integrated firms may also benefit from economies of scope, which occur when different goods can be produced at lower cost together than they could be separately. For example, knowledge transfers between firms could improve manufacturing processes that would boost productivity. Suppose a drug manufacturer buys packaging materials from a packaging firm. If the firms merged, the two departments could redesign the packaging and the pill to make manufacturing more efficient.

Vertical mergers may be anticompetitive if they raise rivals' costs or lead to market foreclosure. Input foreclosure occurs when an integrated firm controls a vital input and uses its market power to disadvantage its downstream rivals. Output foreclosure occurs when an integrated firm controls a downstream market and uses its market power to disadvantage its upstream rivals.

Consider input foreclosure. Suppose an integrated firm controls a substantial share of the upstream market for a vital input. By reducing the quantity of input that it sells to its downstream rivals, the integrated firm induces a decrease in supply, which would increase the cost of the input.[19] This raises the cost to the downstream rivals of producing their good. The downstream rivals may pass these costs on to consumers in the form of higher prices, in which case output quantity decreases and there is a social welfare loss. Meanwhile the integrated firm not only makes a higher margin on its own products, but it can also capture increased downstream market share. Such a venture is profitable for the merged firm only if the increased profits are greater than the loss in profits from reducing the input quantity sold.

The success of input foreclosure depends on the importance of the input as well as the integrated firm's market power in the input market. If the input has many substitutes, for example, downstream rivals may turn to other suppliers. Additionally, barriers to entry in the upstream market are necessary to prevent other firms from entering and driving down the price of the input good.

For example, consider the merger of AT&T and Time Warner in 2018. Time Warner owned highly valuable video content, which had high fixed costs, low marginal costs, and, due to its digital nature, could be shared an infinite number of times. Before the merger, Time Warner would have the incentive to sell to anyone who was willing to pay marginal cost or more. Refusing to sell content would only lead to a reduction in profit. AT&T meanwhile owned DirecTV, which is a satellite broadcasting company. The merged entity may have an incentive to offer some of Time Warner's valuable video content exclusively through DirecTV, thereby foreclosing rival cable companies. Similarly, Time Warner could charge higher prices for its video content to rival cable companies, who may pass on costs to consumers, and thereby divert demand. Although the firm would lose revenue on the foreclosed sales, it would gain profit if consumers switched to DirecTV due to the exclusive content.[20]

Vertical mergers may also be anticompetitive if they facilitate coordinated effects. These effects occur when a merger changes an industry in such a way that it makes it easier for

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[19] Analogously, the integrated firm could lower the quality of the input that it provides.

[20] Herbert Hovenkamp, *supra* note 10, at 145-47.

competing firms to coordinate. For instance, vertical mergers may facilitate coordination where a firm merges with a maverick firm, which is a firm that refuses to cooperate with other firms and therefore protects competition. For example, say that a number of firms agree to fix prices. A firm that does not join the cartel and undercuts the cartel price would be a maverick firm. The maverick firm protects competition because it forces the cartel to reduce prices in order to compete with the maverick firm. Thus, if a price-fixing firm acquires a maverick firm, price competition is reduced. Additionally, vertical mergers may allow firms to be privy to certain information about the other firm's market which can make coordination easier.

Nishiwaki (2019) studied collusion incentives among vertically integrated firms in the cement and concrete industry.[21] Through his research, he found that collusion among upstream firms is more likely the more widespread is integration. He concluded that this trend may derive from the fact that integration disincentivizes cheating on the coordinated agreement. When fewer unintegrated downstream firms exist, there are fewer firms that a cheating upstream firm can sell its products to. Hence, cheating is less profitable, which leads to less cheating, and therefore prolongs the life of a coordinated agreement.

Thus, economic theory supports the fact that vertical mergers can have both procompetitive effects—by eliminating double marginalization and reducing transaction costs—and anticompetitive effects—in the event of foreclosure or coordinated effects. Generally, however, anticompetitive effects are only present in markets with higher concentration. Thus, any potential presumption should focus on markets with a high level of concentration.

Empirical evidence

Empirical evidence on vertical mergers is mixed. Although Lafontaine and Slade (2007) determined that vertical mergers were generally procompetitive based on a survey of recent research, recent papers by Lafontaine and Slade (2021) and Beck and Scott Morton (2021) contest this outcome. Instead, they find mixed results: some vertical mergers are procompetitive, some are anticompetitive, and some are neutral.

Lafontaine and Slade (2007) found that vertical integration has positive effects in general.[22] Specifically, vertical integration was marked by a number of efficiencies that benefited consumers. However, their 2007 research focused on competitive industries, which are generally not the focus of antitrust policy. In a later paper, the same authors (2021) looked at studies based on eight retrospective merger analyses and two stock events.[23] They found mixed results—most of the studies had neutral effects which could occur when anticompetitive and procompetitive

[21] Masoto Nishiwaki, An Empirical Study of Upstream Collusion in Vertically Related Industries (May 17, 2019) (unpublished working paper).

[22] Francine Lafontaine & Margaret Slade, *supra* note 2, at 662-63.

[23] Retrospective analyses look at mergers that have been consummated and thus look at actual effects, rather than assumed effects. Stock events are those that look at changes in stock prices when mergers are announced to determine the effect of a merger. For example, a decrease in the stock price of rival downstream firms, may indicate the potential for anticompetitive harm. But results are often ambiguous and rely on expectations rather than reality.

practices balance each other out—but concluded that the small sample size precluded any sort of presumptions on vertical mergers.[24]

Scott Morton and Beck (2021) similarly found mixed evidence of the procompetitive and anticompetitive effects of vertical mergers when studying a larger collection of studies.[25] However, they also caution that much of the empirical evidence is flawed in at least two ways. First, many of the industries studied have low quality data. Thus, any conclusions derived from the data could be unreliable. Second, some of the more egregious mergers would have been precluded by the Agencies. Thus, such studies could have a procompetitive bias.

Thus, whether, on balance, vertical mergers are procompetitive or anticompetitive is still inconclusive. The theoretical and empirical literature suggest that vertical mergers in competitive markets are generally driven by efficiencies that would benefit consumers. Meanwhile vertical mergers in industries characterized "by high concentration, economies of scale and scope, two-sided markets, and/or networks" are more likely to see legal action suggesting that there is more concern for anticompetitive effects.[26] Unfortunately, the theoretical and empirical literature do not provide enough evidence to create strong presumptions. What is clear is that vertical mergers often have both anticompetitive and procompetitive effects. Thus, it is up to the Agencies to determine which effect is stronger, on a case-by-case basis.

Proposed Anticompetitive Presumptions

A legal presumption allows practitioners to infer an effect from a known fact and shifts the burden of proof from the plaintiffs to the defendants. For example, in the horizontal merger case, a merger is presumed to be anticompetitive if it would occur in a market with an HHI greater than 2,500 and would lead to an increase of concentration of at least 200.[27] In these cases, the merging firms have the burden of proof and must present a persuasive case for why the merger would not be anticompetitive. Presumptions are beneficial since they provide clear guidelines for businesses, simplify merger review, and reduce the cost of litigation for the Agencies.

In order to prevent under- and over- enforcement, presumptions should be grounded in experience, economic theory, and common sense.[28] Specifically, for vertical mergers, Lafontaine and Slade (2021) argue that valid presumptions should rely on a body of empirical evidence and

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[24] The authors found four positive effects and 6 neutral effects. However, two of the positive studies were stock event studies which are based on expectations rather than real life events and so these results may be less reliable. The other two positive studies were forced divestiture studies which studied the effect of a forced divestiture. Thus, the most reliable research points to a balancing of pro- and anticompetitive effects.

[25] Fiona Scott Morton & Marissa Beck, *Evaluating the Evidence on Vertical Mergers*, 59 REV. IND. ORGAN. 273, 274 (2021).

[26] Margaret Slade, *Vertical Mergers: A Survey of Ex Post Evidence and Ex Ante Evaluation Methods*, 58 REV. IND. ORGAN. 493, 494 (2020).

[27] U.S. DEP'T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, *supra* note 14.

[28] Directorate for Financial and Enterprise Affairs Competition Committee, Safe Harbours and Legal Presumptions in Competition Law: Background Note by the OECD Secretariat (Nov. 9, 2017), https://one.oecd.org/document/DAF/COMP(2017)9/en/pdf.

should be unique to vertical integration.[29] Baker, et al. (2019) have suggested five presumptions, which are relevant when at least one of the markets in the proposed vertical merger is concentrated. [30]

First, Baker et al. recommend a foreclosure presumption. When an integrated firm has substantial market power in an upstream or downstream market and could thereby foreclose its downstream or upstream rivals, it should be presumed to be anticompetitive. The firms would need to prove that they would have neither the ability nor the incentive to foreclose rivals by, for example, arguing that substitutes exist or that there are few barriers to entry in the affected market.

Second, if there is a high probability that the upstream or downstream firm is poised to enter the other market, the merger should be presumed to be anticompetitive. The merger would eliminate actual entry or the fear of potential entry that could keep the market competitive. But, in some situations, it may be more efficient for a firm to merge with an existing upstream or downstream firm, than to develop its own new division. The threat of potential competition should be weighed against the potential efficiencies of the merger.

Third, if a vertical merger involves a maverick firm, i.e., a firm that by its actions has shown that it precludes coordination, then the merger should be deemed anticompetitive. After merging, it may be the case that the integrated firm no longer has an incentive to act as a maverick, which could reduce competition and thereby harm consumers.

Fourth, a merger that would allow a firm to evade price regulation should be deemed presumptively anticompetitive. For example, if the downstream firm's maximum price is regulated, an integrated firm may attempt to misallocate costs to the downstream firm so that it could raise the regulated price. Additionally, when the integrated firm involves complementary products, it may bundle its products and associate any price increases with the unregulated product.[31]

Fifth, a vertical merger that involves a dominant platform merging with a potential competitor or a firm in an adjacent market should be presumed to be anticompetitive. A dominant platform is a firm with market power, whose business model is one that creates value by facilitating interactions between at least two independent groups. This presumption is similar to the one involving elimination of potential entry since rivals in adjacent markets can be potential entrants.

These presumptions reflect the recent theoretical literature on the potential harms of vertical mergers. But, as Lafontaine and Slade (2021) argue, the Agencies have little experience litigating vertical mergers under these theories of harm as well as not enough empirical evidence

[29] Francine Lafontaine & Margaret Slade, *Presumptions in Vertical Mergers: The Role of Evidence*, 59 REV. IND. ORGAN. 255 (2021).

[30] Jonathan B. Baker, et al., *supra* note 3, at 12.

[31] See United States v. AT&T, 552 F.Supp. 131 (D. D.C. 1982).

to support their foundation as presumptions.[32] These five principles can be used to identify potentially harmful vertical mergers, but more experience in using these theories of harm in vertical merger litigation must be gained and more high-quality empirical studies must be conducted before these principles should be considered presumptions.

Conclusion

Our understanding of vertical mergers and their potential harms has made great strides in the last few decades, which made the 1984 Nonhorizontal Guidelines obsolete. Now, it is a matter of incorporating the new theory into antitrust policy. The 2020 Vertical Merger Guidelines were an important milestone, but their subsequent withdrawal by the FTC leaves uncertainty for the business community on future vertical merger enforcement. At this time, the Agencies are drafting a new set of guidelines after a comment period that ended on March 21, 2022.[33] These guidelines will likely be stricter and include a specific focus on digital markets.

Due to the lack of experience and empirical evidence, it is too early to rely on presumptions for vertical merger enforcement. Presumptions are beneficial because they stabilize enforcement and facilitate merger review and litigation; however, effective presumptions must be supported by both theoretical and empirical evidence. To this end, high quality empirical studies on vertical mergers are needed to support presumptions of harm and identify early warning signs of potentially anticompetitive vertical mergers.

Acknowledgements

I want to thank Roger D. Blair for past collaboration and advice. I also want to thank Roger D. Blair and Emily Walden for their comments on an earlier version of this article. Any mistakes are my own. I would also like to thank the organizers of the ABA Economics Ambassador Program for facilitating interaction with the ABA Media and Technology Committee.

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[32] Francine Lafontaine & Margaret Slade, *Presumptions in Vertical Mergers: The Role of Evidence*, 59 REV. IND. ORGAN. 255 (2021).

[33] Federal Trade Commission Press Release, *Federal Trade Commission and Department of Justice Seek to Strengthen Enforcement Against Illegal Mergers*, (2022). Available at: https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

Frequency Boost

Amplifying Diverse Voices in Media & Technology

Frequency Boost is an interview series focused on learning more about the diverse community of people who have and continue to impact antitrust-related issues in the media & technology sectors.

In this installment, we speak with three accomplished women about their work at the intersection of technology and innovation.

Women in Technology and Innovation

Interview by Melanie A. Hallas Kirsch and
Suzanne Munck af Rosenschold
July 12, 2022

When you're a hammer, everything looks like a nail. This phrase often is used to describe how antitrust lawyers frequently look at legal issues from a competition-first perspective. In this issue, we are shifting the focus to speak with three accomplished practitioners who approach innovation issues from a technology and intellectual property perspective. In particular, Jill Rorem and Erin Toomey offer their views on technology and e-discovery, and Molly Silfen provides insight into how a patent lawyer is looking at the issues of the day. Please join us as we learn more about their background, their work with antitrust lawyers, and their views on the future.

To start, we'd like to learn more about your background. What does an average workday look like for you?

Jill Rorem, Senior Managing Director, Legalpeople: I wish I could accurately describe an average workday! In document review/ediscovery, I typically have a day planned that corresponds to my to do list and one phone call can throw it out of whack. In a perfect world, I'll spend the morning reading through the metrics generated by our project managers for every active project that I am following. I'll check to make sure we are meeting our targets as far as budget, progress and deadlines go. I am also the problem solver if a matter isn't going in the direction we had hoped. A few times a week, my day includes team meetings where we review progress on active projects as well as discuss upcoming matters that need staffing. It's a puzzle and we aim to roll the attorneys from one matter to another. I also travel a lot to visit clients and attend various conferences where I have clients speaking or attending. Throughout all of the above-described activity and most importantly, I field requests for upcoming new document review matters and provide budgets and/or estimates and/bids. It is those calls which throw my carefully planned day into glorious chaos, as document review is usually met with a NOW NOW NOW energy. After such a call, I snap into action. I engage our staffing team to staff our document reviews based on the specific qualifications requested by our clients. These teams vary in size with our biggest and most intense matters often involving antitrust scenarios (typically 50-250 people). I engage our project management team and begin to strategize with the client about the plan of attack. At times, I get multiple such requests every day and have to prioritize based on the urgency of each matter. Frankly, as chaotic as it is, it's great fun and I love it.

Erin Toomey, Senior Director, Antitrust and Competition Practice Group, Epiq: In my current role, we are building a practice area specific to Antitrust and Government Investigations, so much of my day is focused on those efforts. This includes overseeing client matters and serving as a final point of escalation to solve challenges for our clients, as well as the more administrative part of building a service delivery team: recruiting, mentoring, financial tracking, and developing marketing collateral.

Most days I speak with a number of our active clients as part of our regular status calls and monitor emails. I'm also part of internal discussions to build additional solutions related to technology and operational efficiencies. That's when things get fun: getting to identify new areas and ways to meet our client's needs like creating conduct monitoring tools using artificial intelligence.

Molly Silfen, Counsel Detailee from the USPTO to the Senate Judiciary Committee (Senator Patrick Leahy): In my current position, an average workday involves a lot of meetings: meetings with stakeholders on patents or copyrights or antitrust issues; meetings with staffers from offices of other senators or representatives; meetings with others in Senator Leahy's office. In many ways, each senator's office is a self-contained unit, and the public wants to make sure each senator is apprised of the latest issue.

When I'm not in meetings, I'm working on furthering Senator Leahy's policy priorities using a number of different tools. In addition to legislation, a senator can hold hearings; give speeches or presentations; write op-eds or speak to the media; facilitate meetings between different groups either within or outside the government; write letters to people in the other branches of government or in the private sector; and use any number of other tools. I spend a lot of my time using these different tools to improve policy or help stakeholders or constituents.

How did you move into your current role? Did you always want to do what you're doing today?

Jill: I arrived in ediscovery by accident. I was a practicing attorney in labor and employment form 1999-2001. Uninspired by the practice of law and inspired by a stint as a waitress at The Second City Theater during law school, I quit law, packed up my life and moved to LA after being accepted to an agent training program at one of the big three agencies in Hollywood. It was great fun and quite ridiculous at times, but at the end of the day, it wasn't for me and so I came back home to Chicago. Those stories are for a different article. When I came back, I started a position as a legal recruiter where I applied the skills I acquired in LA to placing lawyers and paralegals rather than actors. I stuck with that for many years until 2009 when the bottom fell out of the market and no one was hiring, let alone using recruiters to find candidates. I quickly pivoted to placing attorneys into temporary positions, which were plentiful. I spent a great deal of time researching ediscovery and document review and became an expert on the people aspect of the work. I have operated since then with the belief that if you treat people like they make a difference, they will make a difference and it has worked for the success of my business. Document review can be mundane and by letting people know that you find them valuable and treat them as such, their work product will be better than if you don't treat them well. When the market started to rebound, I tried to keep both permanent placement and temporary placement going at the same time, but alas, ediscovery is like a weed that killed everything else I tried to do, so I have focused there for the last decade plus. It wasn't where I saw myself in law school, but it fits me like a glove.

Erin: I have worked in Discovery for my entire career with a focus on government investigations and the last 8+ years working on antitrust matters including Second Requests and competition related litigation. As I developed expertise in supporting these merger matters and other "bet the company" antitrust litigations, I saw the opportunity to share that experience with others and began managing large teams supporting these types of projects. About a year ago, a former colleague reached out to encourage me to consider leading a practice focused solely on these specific types of discovery matters.

When I started in the industry out of college, I didn't know what discovery was! I'd never heard of Concordance and Relativity didn't exist back then. I had a Management Information Systems degree, and this opportunity within a consulting firm felt like a great way to blend my business and technology background for a first job. I realized I enjoyed the work and have grown within the industry ever since.

Molly: I found this role, as with many things I've done in my career, through fortuitous happenstance. I am doing this job on a detail from the USPTO's Office of the Solicitor. (A detail is a long-term assignment in the government. It's the fantastic system where you can take some time off from your regular job and do a job in a different part of your agency, a whole different agency, or in this case a whole different branch of government.) A friend from the USPTO had been working for Senator Coons on a detail. I was curious about his job on the Hill, since I had never worked on the Hill and had very little sense of what it was like. He mentioned that Senator Leahy had recently become Chair of the Senate's intellectual property subcommittee and was looking for someone with an IP background to join his office. After a few emails and interviews, I found myself working for Senator Leahy.

What advice would you give someone who wants to do what you do?

Jill: Be ready for a 24/7 experience, as ediscovery doesn't care about your kid's graduation, your vacation or your family dinner. The work comes when it comes and the deadlines are real. The business is competitive and if you are not immediately responsive, there is a line of agencies ready to staff that review instead of you. I've come to terms with it. The craziest experience for me was staffing a document review in the middle of an all-day sailing trip in Greece. Because of the unpredictable nature of this beast, I also advise people to take your rest when it comes to you. Are things slow in document review? Go get a pedicure in the middle of the work day. If you're not ok being tied to your phone 24/7 no matter what you're doing in your personal life, this position may not be for you.

Erin: Be willing to do the hard work early on. Having experience in the basics of discovery, from how processing tools work, what's required for productions, identifying the nuance of opposing sides, and building rapport with clients on matters early in your career will set you up for success later in your career.

Even more important than having the necessary skills is building and maintaining relationships in your career. Someone who was a former colleague or client may be a decision maker later in your career or the person that introduces you to the next exciting opportunity in your career. While building those strong relationships can be work, it is also the enjoyable part of the work too. We spend so much time with those in our professional circles and the world is small, so it's always important to be kind and to stay in touch for the future.

Molly: It always helps to keep up with friends and former colleagues. As much as websites like USAJobs are great for seeing what opportunities are out there, someone who is in the field you want to get into will know not only what opportunities are currently available, but also what might be coming soon, or what might be a good fit even if the job description may not be terribly specific. And even if your friend does not have the information you're looking for, they can often introduce you to someone else who does.

Turning to technology for antitrust lawyers, how do you explain your work to non-specialists?

Jill: I try to avoid it, as I can see people's eyes glaze over when I try to tell them what I do.

Erin: We manage the large volumes of data and ensure that attorneys are able to understand the facts and case details in merger and other antitrust matters. This means we gather all of the electronic data collected, from email to text message and anything in between, leverage technology to reduce data where we can and identify patterns and themes in the data. When we are able to work as partners alongside our clients, we can often help them find the "needle in the haystack" for their case and otherwise ensure the technical aspects of a matter goes smoothly.

Molly: I mostly talk about all of the meetings. It's like a torrent of information all the time, and I'm trying to sift through the information to understand where there's a concrete action I can take that will help, without causing unintended consequences.

Interestingly, unlike in my work at the USPTO, it's pretty infrequent that I'm sitting down and digging into a new technology. And ironically the most I've had to think about technology recently has been when thinking not about patents but a copyright issue—the issue of what technical measures are available and employed in identifying and protecting against copyright infringement on the internet.

What is the most common thing you teach antitrust lawyers?/What do you wish antitrust lawyers knew about your role?

Jill: My antitrust experience comes directly from providing contract attorneys and management teams to handle document reviews in response to Second Requests. The matters can be very intense, as we typically have a short amount of time to review a high volume of documents by the government imposed deadlines. I want antitrust lawyers to know that it is our role to complete this work under their direction on time and accurately. I also want them to know that the review process is better when we are included in strategy discussions where we can contribute our expertise on team size and work conditions so that our teams of attorneys can meet the rigorous deadlines with accuracy and precision.

Erin: Technology can be your biggest asset in a case. In a litigation, our team can help you find those hot documents early to shape case strategy and ensure you are in the best position with regulators or opposing counsel. This can include identifying supporting documents for advocacy, evidence needed to support a leniency filing, or identifying key players and chronologies for the case. In order to be most effective in assisting these ways, it is important to share key details and build a dialogue with your discovery provider.

Molly: I'm always surprised how much antitrust and IP issues overlap, yet IP lawyers often know very little about antitrust law and vice versa. For example, the current state of debate over drug pricing focuses heavily on antitrust law and ways to use that as a check on the high cost of drugs. But even when the discussion turns to patents, it's often a discussion of patent misuse, which assumes a duly issued patent. There's very little discussion of whether some of those patents should have been granted in the first place, which in some cases seems like the root of the problem.

On the flip side, what have you learned from an antitrust lawyer?

Jill: Honestly, I only work with antitrust lawyers in one scenario – edsicovery either from a Second Request or a third-party subpoena or any resulting litigation. From my vantage point, I am typically in awe of them as they straddle two areas of law, corporate M&A and litigation, which is unusual and impressive. Their nerves of steel as they engage in "bet the company" scenarios impress me as well.

Erin: Working with antitrust lawyers daily, we are able to build and strengthen our best practices through iterative experience. When attorneys challenge and push us to be our best, it allows us to rise to the challenge and push ourselves to improve as well. In a recent case, we were able to improve our standard responses related to the negotiation of TAR workflows to include new considerations based on recent deviations from the DOJ and FTC.

Molly: It has been fascinating to learn about the tools antitrust lawyers use to look at how a market is operating. The types of problems in antitrust law seem new, yet there's often a useful analogue that provides a helpful lens for looking at it. I've been very impressed with the number of creative policy solutions out there to address the significant antitrust issues in the United States today.

In conclusion, what do you think will be the most interesting technological issue in the next three years? What should we watch out for?

Jill: I will be curious to watch the continuing expansion of relevant documents due to the huge and growing variety of media that people use in their work day, versus the continuing efforts to cull this data through the application of artificial intelligence. This push-pull has been happening for years, and we expect it to continue into the foreseeable future.

Erin: We are hearing increased requests for antitrust compliance programs and solutions that identify anticompetitive conduct in an automated fashion. This is likely as a result of increased scrutiny and the current climate from the White House and antitrust enforcement agencies. As such, we will likely see new products and tools that aid in identifying this type of data. As the data is able to be identified, there will likely be changes to guidelines and revised negotiation expectations to clear hurdles of discovery compliance.

Molly: In the patent law world, I'm watching for a good blockchain-related solution to patent questions. Disputes over patent ownership arise surprisingly frequently. Licenses do not always list specific patents but instead sometimes refer to a category of patents that are covered. And they are not attached to the patent itself. There is no centralized database that tells the public who owns which patents (though Senator Leahy is working to address that). It seems like every patent could have attached to it, virtually, a list of all of the licenses and transfers that have ever included that patent. And the patent could be updated in real time as claims are enforced or invalidated by courts or amended in USPTO proceedings.

In the real world, I am excited about the renewable energy revolution that is happening right now. Not long ago people thought financially viable renewable energy was impossible, but it is quickly becoming reality through impressive engineering breakthroughs. Houses with solar panels send energy back to the grid or store excess energy in car batteries. There is so much more exciting technology coming, and it can't come soon enough.


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