

Antitrust Enforcement Trends and Key Developments in 2019

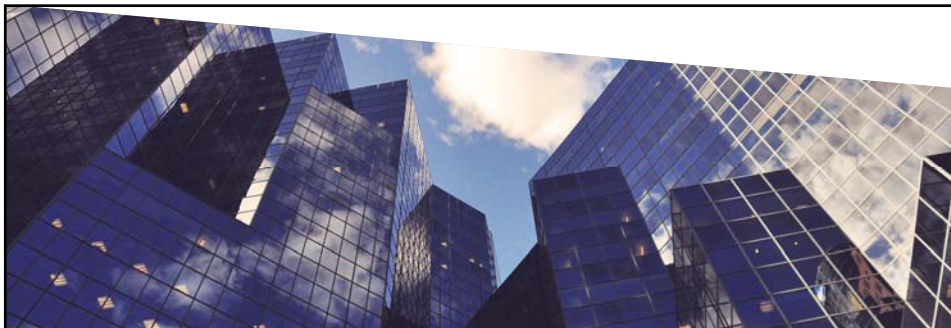
Presented by: Courtney B. Averbach, Daniel I. Booker, Christopher R. Brennan,
Jennifer M. Driscoll and William J. Sheridan
June 4, 2019

“Antitrust Enforcement Trends and Key Developments in 2019”
Courtney B. Averbach, Daniel I. Booker, Christopher R. Brennan,
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Course Materials [Click titles to open documents]

1. “Antitrust Enforcement Trends and Key Developments in 2019” Presentation Slides
2. Competitive Impact Statement - *U.S. and Plaintiff States v. CVS Health Corp., and AETNA, Inc.*
3. Complaint - *U.S. and Plaintiff States v. CVS Health Corp., and AETNA, Inc.*
4. U.S. Motion to Clarify and Amended Tunney Act Procedure - *U.S. and Plaintiff States v. CVS Health Corp., and AETNA, Inc.*
5. U.S. Witness List and Request for Clarification of Procedures for Tunney Act Hearing - *U.S. and Plaintiff States v. CVS Health Corp., and AETNA, Inc.*
6. “Opening Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act,” Makan Delrahim (April 11, 2019)
7. *Apple Inc. v. Pepper, et al.*, 587 U. S. ____ (2019)
8. Presenter Profiles



Antitrust Enforcement Trends and Key Developments in 2019

Prepared for **Association of Corporate Counsel**
June 4, 2019

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Agenda

1. Introduction
2. Trends in criminal enforcement
3. Merger enforcement
4. *Apple v. Pepper*



Today's Presenters



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Trends in Criminal Antitrust Enforcement: What Happens Now and What's Next

Antitrust – Sherman Act section one

Per Se antitrust violations

- Section One of the Sherman Act (15 U.S.C. § 1)
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
- Elements
 - Agreement
 - Between competitors
 - Affecting interstate or foreign commerce
 - Price-fixing
 - Bid-rigging
 - Customer allocation

Antitrust – Sherman Act section one (cont.)

Per Se antitrust violations – The key is an agreement



Antitrust – Sherman Act section one (cont.)

Per Se antitrust violations

- Penalties for section one violations
 - Corporations: \$100 million fine or “twice the gross pecuniary gain or twice the gross pecuniary loss.”
 - Treble damages in follow-on civil lawsuits
 - Individuals: \$1 million fine and/or imprisonment for up to 10 years
 - 82 corporations and individuals charged in 2011
 - 90 criminal cases filed in 2011
 - In 2015, criminal fines and penalties totalled \$3.6 billion
 - Between 2010 – 2018 the average prison sentence was 19 months

Sherman Act section one – enforcement activity

Leniency and ACPERA

- The leniency program celebrates 25 years
 - There have been some policy changes that have arguably made leniency less attractive:
 - Claw back of non-prosecution agreements by other sections of the DOJ.
 - No guarantee that all executives will receive leniency for the first-in.
- Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA)
 - Is it time for reform?

Sherman Act section one – enforcement activity

Grand jury investigations and criminal cases

- Ninety-one (91) active grand jury investigations at the end of FY 2018
 - Preparing for six (6) trials
 - International investigations or regional matters?
 - Generic drug manufacturer criminal investigation
 - First plea agreement entered in ongoing criminal investigation, announced on May 31

Sherman Act section one and AI

Algorithm collusion

- The Antitrust Division opened its first U.S. case involving computer-based algorithms in 2015
 - Competitors in e-commerce poster market guilty of setting prices through algorithms between September 2013 and January 2014
 - *U.S. v. Topkins*: 6 to 12 months imprisonment and \$20,000 fine
 - *U.S. v. Aston & Trod Lt. d/b/a Buy 4 Less*: \$50,000 fine
 - In the absence of a clear agreement among competitors, what triggers antitrust liability?

Sherman Act section one and AI

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Merger Enforcement

Optional subtitle

Antitrust Enforcement in the Trump Era

- Despite the anticipated “pro-business” approach of the Trump administration, the DOJ and FTC have both continued to challenge and block mergers.
- Examples:
 - May 2017: DOJ blocks Anthem's proposed \$54 billion acquisition of Cigna.
 - June 2017: DOJ blocks \$367 million merger between EnergySolutions and Waste Control Specialists (continuing suit filed under Obama administration).
 - June 2017: FTC moves to stop the merger of DraftKings and Fan Duel, the two largest fantasy sports websites, prompting the companies to call off the deal.
 - September 2017: DOJ sues to partially unwind Parker-Hannifin's \$4.3 billion acquisition of CLARCOR – challenging already consummated deal that it had previously cleared without even seeking additional information during review period.
 - November 2017: DOJ files a lawsuit seeking to block AT&T's proposed \$85.4 billion acquisition of Time Warner. In June 2018, the district court ruled in favor of AT&T, allowing the acquisition to go ahead with no conditions or remedies.
 - December 2017: DOJ files complaint against TransDigm Group Inc.'s \$90 million acquisition of two commercial airplane restraint system business from Takata Corporation, a non-HSR reportable deal that had closed in February 2017. TransDigm settled, agreeing to divest the assets it had acquired from Takata.

Antitrust Enforcement in the Trump Era

- Examples continued:
 - December 2017: FTC challenges Tronox's proposed \$1.67 billion acquisition of Cristal, alleging that it would reduce competition in the North American market for chloride process titanium dioxide (“TiO₂”). In September 2018, the district court granted the FTC's request for a preliminary injunction temporarily blocking the acquisition. In April 2019, Tronox announced that it completed the acquisition, subject to the divestiture of Cristal's North American TiO₂ business.
 - February 2018: FTC challenges Wilhelmsen Maritime Services' proposed \$400 million acquisition of Drew Marine Group, alleging that it would significantly reduce competition in the market for marine water treatment chemicals and services used by global fleets. In July 2018, the district court granted the FTC's request for a preliminary injunction, and the parties abandoned the acquisition.
 - March 2018: FTC challenges proposed \$285 million acquisition of Conagra's Wesson Cooking Oil brand by Crisco owner, J.M. Smucker Co., charging that the acquisition would lessen competition in the United States for canola and vegetable oils. The parties abandoned the deal.
 - March 2018: FTC challenges the proposed merger between two specialized new car dealer management software vendors (CDK and AutoMate) violates federal antitrust law. The parties terminated their stock purchase agreement and withdrew their HSR notification forms.

Case Highlight: CVS-Aetna Merger

- **DOJ's (ostensible) challenge**

- In December 2017, CVS agreed to acquire Aetna for approximately \$69 billion.
- In October 2018, DOJ and five state AGs filed a federal court complaint (ostensibly) challenging the proposed acquisition.
- DOJ alleged that the acquisition would lessen competition for the sale of standalone individual Medicare Part D prescription drug plans ("individual PDPs"), resulting in increased premiums, increased out-of-pocket costs, higher subsidies, and lessening of service quality and innovation.
 - DOJ identified 12 highly concentrated markets where the merger would have the strongest anti-competitive effects.
- The companies serve a combined 6.8 million Medicare Part D members.

Case Highlight: CVS-Aetna Merger

- **The proposed remedy**

- At the same time that it filed the Complaint, DOJ also filed a proposed final judgment and asset preservation stipulation and order, designed to prevent the merger's likely anticompetitive effects.
 - The proposed final judgment required the divestiture of Aetna's nationwide individual PDP business, and to take other steps to allow the divestiture buyer with a similar ability and incentive to compete as Aetna has today.
- Despite DOJ's approval of the merger subject to the divestiture, Judge Leon of the U.S. District Court for the District of Columbia threw a wrench into the merger in December 2018, after the deal formally closed.

Case Highlight: CVS-Aetna Merger

• Judge Leon's oversight

- The Tunney Act requires a federal court to examine whether a DOJ settlement sufficiently addresses alleged consumer harms.
 - While judges have some discretion under the Tunney Act, it is often viewed as a “rubber stamp.”
- Judge Leon – a George W. Bush appointee – expressed skepticism of the government's negotiated remedy, citing opposition from groups including the American Medical Association, the AIDS Healthcare Foundation, and other consumer and pharmacist groups.
- Starting today, Judge Leon is overseeing an unusual three-day evidentiary proceeding including live witness testimony to weigh concerns about the deal.
 - DOJ has pushed back because it was not able to select witnesses for the hearing, and no cross-examination will be allowed.
 - Judge Leon also refused to seal the courtroom, citing the public interest.

Case Highlight: CVS-Aetna Merger

• Implications

- While it remains to be seen whether the CVS-Aetna merger will be fully consummated (although the companies have already started the process of integrating), Judge Leon's unusual handling of the proposed DOJ settlement raises questions going forward.
- Commentators speculate that it could create a pathway for more robust merger oversight by other federal judges in the future.
- Continuation of the “populist wave” that defined the 2016 presidential election?



Apple v. Pepper

ptional subtitle

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Prologue: *Illinois Brick* and its progeny

- 1977 – Supreme Ct. holds plaintiff could not assert antitrust claim on allegations that it paid more than it otherwise would have when the person who first paid an overcharge (the direct purchaser) passed on that overcharge to the plaintiff (the indirect purchaser).
 - The majority reasons that allowing claims or defenses based on a pass-on theory would “greatly complicate and reduce the effectiveness” of claims for treble damages.



- The Court later declines to “carve out exceptions” that may undermine the rule against indirect-purchaser suits.

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Prologue: *Illinois Brick* and its progeny

- Applying *Illinois Brick* to classic distribution models:



- Note: many states have adopted “repealer” statutes that allow indirect purchaser to maintain antitrust claims under state laws.

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From Brick and Mortar to the App Store

Apple v. Pepper:

- Plaintiffs alleged that they overpaid when buying apps from developers, through the App Store, because Apple charges developers a 30% commission.
- District Court bars claims.** Commission was “borne by the developers” and then “passed-on to u[sers] as part of the purchase price” for each app.
- Ninth Circuit reverses.** Reads precedent as permitting those claims against distributors with which the plaintiff has a direct relationship.



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So Who Bought First?

- Supreme Court decides case 5-4, with Kavanaugh writing for majority and Gorsuch writing the dissent.
- **Majority:** Apple's argument improperly elevates form over economic substance.
 - Instead, a "straightforward conclusion" that iPhone owners buy apps from Apple's App Store, and can sue under *Illinois Brick*.
- **Dissent:** Plaintiffs' argument improperly elevates form over purpose. *Illinois Brick* limits the right to sue for antitrust violations to those that first feel the impact of an overcharge.
 - Each app developer gets to decide price of app.



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Broader Implications...

- Should companies revise their contracts?
- Chipping away at *Illinois Brick*?
- Kavanaugh: Breaking rank with conservatives?
- A reckoning for hipster antitrust Apple and dominant platforms?



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Questions?



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Thank you!

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*

Plaintiffs,

v.

CVS HEALTH CORPORATION

and

AETNA INC.

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America files this Competitive Impact Statement under Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. § 16(b), relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

On December 3, 2017, CVS Health Corporation agreed to acquire Aetna Inc. for approximately \$69 billion. The United States filed a civil antitrust Complaint on October 10, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for the sale of standalone individual Medicare Part D prescription drug plans (“individual PDPs”), resulting in increased premiums and increased out-of-pocket costs paid by Medicare beneficiaries, higher subsidies paid by the

federal government (and ultimately, taxpayers), and a lessening of service quality and innovation, all in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time that it filed the Complaint, the United States also filed a proposed Final Judgment and Asset Preservation Stipulation and Order, which are designed to prevent the merger's likely anticompetitive effects. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest Aetna's individual PDP business. Until the divestiture is complete, the Asset Preservation Order requires Defendants to take certain steps to ensure that, while the required divestitures are pending, all of the divestiture assets will be preserved.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. Defendants and the Proposed Transaction

CVS, based in Woonsocket, Rhode Island, is involved in numerous areas of the healthcare delivery chain. CVS operates the nation's largest retail pharmacy chain; owns Caremark, a large pharmacy benefit manager, which, among other things, connects health plans or employers to pharmacies and drug manufacturers in the pharmacy services supply chain; and sells Medicare Part D prescription drug plans to individuals and groups under the brand name SilverScript. SilverScript plans are available in all 50 states and the District of Columbia, and have the second-largest enrollment in individual PDPs nationwide. CVS's overall 2017 revenues were approximately \$185 billion.

Aetna is based in Hartford, Connecticut, and is the nation's third-largest health insurance company, providing commercial health insurance; plans under the Medicare Advantage, Medicare Supplement, and Medicaid programs; Medicare Part D prescription drug plans; and pharmacy benefit management services. Like CVS, Aetna offers individual PDPs in all 50 states and the District of Columbia. Aetna is the fourth-largest provider of individual PDPs nationwide. Aetna's 2017 revenues were approximately \$60 billion.

On December 3, 2017, CVS agreed to acquire Aetna for approximately \$69 billion. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on October 10, 2018. The proposed transaction would lessen competition substantially in markets for the sale of individual PDPs. In recognition of the significant competitive concerns raised by the proposed merger, Defendants have agreed to divest Aetna's individual PDP business.

B. *The Competitive Effects of the Transaction on Individual PDP Markets*

1. Relevant Markets

As alleged in the Complaint, individual PDPs are a relevant product market under Section 7 of the Clayton Act. For the vast majority of Medicare beneficiaries, prescription drug coverage is determined by how they obtain medical coverage: beneficiaries who have chosen Original Medicare can enroll in an individual PDP, and beneficiaries enrolled in Medicare Advantage, a private insurance option that replaces Original Medicare, can enroll in a plan that includes drug coverage.

Once beneficiaries have chosen between Original Medicare and Medicare Advantage, they are very unlikely to switch between the two programs. *See United States v. Aetna*, 240 F. Supp. 3d 1, 27-29 (D.D.C. 2017). As the Complaint alleges, only about two percent of

individual PDP members convert to Medicare Advantage plans each year during open enrollment, and an even smaller percentage of individuals convert from Medicare Advantage plans to individual PDPs. As a result, a hypothetical monopolist of individual PDPs could profitably raise prices by a small but significant amount on individual PDPs without risking loss of substantial membership to Medicare Advantage plans.

The Complaint alleges that the relevant geographic markets under Section 7 of the Clayton Act for individual PDPs are Medicare Part D regions. The Centers for Medicare & Medicaid Services (“CMS”), a component of the Department of Health and Human Services, has divided the country into 34 Part D regions, none of which is smaller than a single state. CMS requires the companies that sell individual PDPs, also known as Part D plan sponsors, to offer the same plans at the same price across the entire Part D region. Individuals can only purchase PDPs that are offered in the region where they reside. Thus, a prospective purchaser of an individual PDP would be unable to turn to plan sponsors outside of the Part D region in response to a price increase.

2. Competitive Effects

Competition is an essential element of individual PDP markets. Congress designed the Medicare Part D program to rely on competition among multiple private plan sponsors to keep annual bids—which form the basis for federal government subsidies and beneficiary premiums—low.

The proposed merger is likely to cause a significant increase in concentration and result in highly concentrated markets in 12 of the regions identified in the Complaint: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Ohio, and South Carolina. In each of these regions, the merger would eliminate significant head-

to-head competition between CVS and Aetna. As alleged in the Complaint, CVS's and Aetna's individual PDPs are among the fastest growing plans in the country, and competition between them has led not only to lower premiums and out-of-pocket expenses but also improved drug formularies (lists of drugs that govern an enrollee's coverage and required copayments), more attractive pharmacy networks, enhanced benefits, and innovative product features. Following the proposed transaction, the merged firm would control at least 35% of the individual PDP market in each region, with a high of 53.5% in Hawaii. In each of these regions, the combination of CVS and Aetna would surpass the thresholds necessary to establish a presumption of enhanced market power and a substantial lessening of competition. *See United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (holding that market concentration can establish a presumption of anticompetitive effects).

In addition, in five of the Part D regions discussed above (Arkansas, Georgia, Kansas, Mississippi, and Missouri), as well as four additional regions (North Carolina, Oklahoma, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming), the merged company will account for between 35% and 55% of all low-income-subsidy-eligible beneficiaries, including those who enroll in Medicare Advantage plans with prescription drug benefits. When combined with other market factors, these increases in the share of low-income subsidy beneficiaries suggests that the merger would likely result in further loss of competition.

Specifically, the merger would likely increase the merged company's ability to influence a critical feature of the Medicare Part D program called the low-income subsidy ("LIS") benchmark, which in turn would increase premiums and out-of-pocket expenses for basic individual PDPs—those plans that provide an equivalent to the minimum coverage set forth in 42

U.S.C. § 1395w-102 and in which LIS beneficiaries can enroll (or be auto-enrolled) for free. As explained in the Complaint, plan sponsors submit bids for their basic plans each year, and CMS calculates a region-by-region, LIS enrollment-weighted average of these bids to determine the low-income benchmark and low-income subsidy. When bids are higher, the low-income subsidy—paid by the federal government—is higher, as are the premiums paid by those who do not receive a low-income subsidy.

The LIS benchmark also, as a practical matter, encourages plan sponsors to offer lower bids. If plan sponsor bids above the low-income benchmark, it risks not only losing thousands of new enrollees but also risks having CMS transfer tens or even hundreds of thousands of current enrollees to a below-benchmark competitor. The uncertainty and risk associated with missing the low-income benchmark, especially by more than a de minimis amount, contribute to keeping bids low.

3. Entry and Expansion

Neither entry nor expansion is likely to solve the competitive problems created by the merger between CVS and Aetna. Recent entrants into individual PDP markets have been largely unsuccessful, with many subsequently exiting the market or shrinking their geographic footprint. Effective entry into the sale of individual PDPs requires years of planning, millions of dollars, access to qualified personnel, and competitive contracts with retail pharmacies and pharmaceutical manufacturers, and companies must establish sufficient scale quickly to keep their plans' costs down. Because of these barriers to entry, entry or expansion into the sale of individual PDPs is unlikely to be timely or sufficient to remedy the anticompetitive effects from this merger.

III. Explanation of the Proposed Final Judgment

The divestiture mandated by the proposed Final Judgment will resolve the United States' concerns about the likely anticompetitive effects of the acquisition by requiring CVS to divest Aetna's individual PDP business nationwide. To ensure that the acquirer of Aetna's business will replace Aetna as an effective competitor and innovator in each of the 16 markets in which the Complaint alleges that the proposed merger would harm competition, the United States carefully scrutinized Defendants' businesses to identify a comprehensive package of assets for divestiture.

A. *Scope of the Divestiture*

In evaluating a remedy, the United States' fundamental goal is to preserve competition. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 324 (1961) ("The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition."). This goal is most directly accomplished through a divestiture of the overlapping products. Because the goal of a divestiture is to create a viable entity that will effectively preserve competition, in certain cases, the divestiture must include assets that are beyond the affected relevant market.

Guided by these principles, the United States identified a divestiture package that remedies the various dimensions of harm threatened by the proposed merger:

- First, the proposed Final Judgment requires CVS to divest both of Aetna's individual PDP contracts with CMS, which is the portion of Aetna's business that vigorously competes head-to-head with CVS today. Divestiture of Aetna's nationwide individual PDP business—and not just Aetna's business in the regions identified in the Complaint—will provide the acquirer with the scale and ability to implement a national strategy comparable to Aetna's current strategy. That is because contracts with pharmacy benefit managers, retail pharmacy networks, and pharmaceutical companies are almost all negotiated on a national basis, with the number of Medicare beneficiaries covered by the plan sponsor being a key factor

in the rates that the plan sponsor receives. Thus, a national divestiture helps provide the acquirer with the ability to replicate Aetna's cost structure and approach to the market.

- Defendants are also required to transfer data relating to Aetna's individual PDP business, information regarding the amount that Aetna pays to retail pharmacies in exchange for filling prescriptions for Aetna members, and any contracts with brokers that currently sell Aetna's individual PDPs, including information regarding how much Aetna currently pays these brokers. The transfer of this data and information will help ensure that the acquirer has sufficient knowledge and supporting information that it can use to negotiate comparable retail-pharmacy rates and contracts with brokers moving forward.
- The divestiture buyer also will have the opportunity to interview and hire Aetna's current employees with expertise related to the individual PDP business, and Defendants have agreed to waive any non-compete, confidentiality, or non-disclosure employment provisions that would otherwise prevent these employees from accepting positions with the individual PDP business of the acquirer. These employees and their knowledge of drug-manufacturer rebates (volume-based discounts on the price of brand name drugs) will provide the acquirer with the option of continuing Aetna's approach to the market.

Taken together, these assets constitute the entirety of Aetna's individual PDP business and will provide the acquirer with a similar ability and incentive to compete as Aetna has today.

Because the divested assets will be separated from Aetna and incorporated into the acquirer's business, the proposed Final Judgment includes provisions to foster the seamless and efficient transition of the assets. At the acquirer's option, Defendants are required to enter into an administrative services agreement to provide the acquirer all services required to manage the divestiture assets through the remainder of the 2018 plan year and through the 2019 plan year, which ends on December 31, 2019. This provision of the proposed Final Judgment provides continuity to members who purchase an Aetna individual PDP during the open-enrollment period running from October through December 2018. Because CMS has already reviewed and approved Aetna's proposed 2019 plans, requiring Aetna to continue to provide the requisite support and services for these plans will ensure that members receive the products that they have

chosen. Among other things, the proposed Final Judgment allows the acquirer to rely on Aetna to assemble and contract with pharmacy networks, administer the plans' formularies, and provide back-office support and claims administration functions in 2019. Additionally, CVS and Aetna must allow the acquirer to use the Aetna brand for the divestiture assets through at least December 31, 2019, and CVS and Aetna are prohibited, through 2020, from using the Aetna brand for the CVS individual PDP business that they are retaining. This will provide the acquirer with a window to establish a relationship with current Aetna individual PDP beneficiaries which will help avoid consumer confusion.

B. *The Divestiture Process*

The proposed Final Judgment requires CVS and Aetna, within 30 days of the filing of the Complaint, to divest, as a viable ongoing business, Aetna's individual PDP business. The proposed Final Judgment also requires CVS and Aetna expeditiously to obtain all regulatory approvals necessary to complete the divestiture, specifying that they must apply for these approvals within five calendar days of the United States' approval of a divestiture buyer. CVS and Aetna have already entered into an agreement to sell the divestiture assets to WellCare, a health insurance company, and the United States has determined that WellCare is a suitable buyer for the divestiture assets. WellCare already has experience providing individual PDPs throughout the United States. The divestiture assets, when combined with WellCare's existing business, will allow WellCare to become more competitive for both low-income subsidy and non-low-income subsidy Medicare beneficiaries by providing WellCare with increased scale and the opportunity to incorporate and build upon Aetna's existing strategy by hiring current Aetna employees.

Should the sale of the divestiture assets to WellCare not be completed, the assets must be divested in a way that satisfies the United States in its sole discretion that the assets can and will be operated by another company as a viable, ongoing business that can compete effectively in the relevant markets. CVS and Aetna must take all reasonable steps necessary to accomplish the divestiture quickly and to cooperate with prospective buyers.

If Defendants do not accomplish the divestiture within the 30 days prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a Divestiture Trustee, selected by the United States and paid for by CVS and Aetna, to effect the divestiture. After the Divestiture Trustee is appointed, the Trustee will file monthly reports with the United States and, as appropriate, the Court, setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the Divestiture Trustee and the United States will make recommendations to the Court, which will enter such orders as appropriate under the circumstances.

C. Provisions to Ensure Compliance

To ensure a smooth transition process for the divestiture assets, particularly during the temporary period when they will be managed by CVS, the proposed Final Judgment provides that the United States may appoint a Monitoring Trustee with the power and authority to investigate and report on Defendants' compliance with the terms of the Final Judgment and the Asset Preservation Stipulation and Order during the pendency of the divestiture. The Monitoring Trustee would not have any responsibility or obligation for the operation of Defendants' businesses. The Monitoring Trustee would serve at Defendants' expense, on such terms and conditions as the United States approves, and Defendants must assist the Trustee in fulfilling his or her obligations. The Monitoring Trustee would file reports with the United States and, as

appropriate, the Court, every 90 days and would serve until the later of January 1, 2020 or the expiration of the administrative services agreement described in Paragraph IV(H) of the Final Judgment.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. The proposed Final Judgment provides the United States with the ability to investigate Defendants' compliance with the Final Judgment and expressly retains and reserves all rights for the United States to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore competition that would otherwise be harmed by the merger. Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Should the Court find in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final

Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the Final Judgment, Defendants agree to reimburse the United States for attorneys' fees, experts' fees, and costs, including fees and costs relating to the investigation of the potential violation, incurred in connection with any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation.

The Final Judgment will expire ten years from the date of its entry. After five years, however, the United States may request that the Court terminate the Final Judgment if the divestitures have been completed and the continuation of the Final Judgment is no longer necessary or in the public interest.

IV. Remedies Available To Potential Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Peter Mucchetti
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 4100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against CVS's acquisition of Aetna. The United

States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of individual PDPs in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. Standard of Review under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment “is in the public interest.” 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

- (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court’s inquiry is necessarily a limited one as the government is entitled to “broad discretion to settle with the defendant within the reaches of the public interest.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc’ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad

discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court’s review of a consent judgment is limited and only inquires “into whether the government’s determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable”).¹

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government’s complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court’s role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “*within the reaches*

¹ The 2004 amendments substituted “shall” for “may” in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc’ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments “effected minimal changes” to Tunney Act review).

of the public interest.” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).² In determining whether a proposed settlement is in the public interest, a district court “must accord deference to the government’s predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.” *SBC Commc’ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be “deferential to the government’s predictions as to the effect of the proposed remedies”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States’ prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’” *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that

² *Cf. BNS*, 858 F.2d at 464 (holding that the court’s “ultimate authority under the [APPA] is limited to approving or disapproving the consent decree”); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist’s reducing glass”). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States “need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” *SBC Commc’ns*, 489 F. Supp. 2d at 17.

Moreover, the court’s role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to “construct [its] own hypothetical case and then evaluate the decree against that case.” *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government’s decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (“[T]he ‘public interest’ is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged.”). Because the “court’s authority to review the decree depends entirely on the government’s exercising its prosecutorial discretion by bringing a case in the first place,” it follows that “the court is only authorized to review the decree itself,” and not to “effectively redraft the complaint” to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts “cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.” *SBC Commc’ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that “[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.” 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: “[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.” 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court’s “scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.” *SBC Commc’ns*, 489 F. Supp. 2d at 11.³ A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

³ *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the “Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone”); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (“Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.”); S. Rep. No. 93-298, at 6 (1973) (“Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.”).

VIII, Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: October 10, 2018

Respectfully submitted,

/s/

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Washington, DC 20530

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San Francisco, CA 94102

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Tallahassee, FL 32399-1050

STATE OF HAWAII
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Honolulu, HI 96813

STATE OF MISSISSIPPI
P.O. Box 22947
Jackson, MS 39225

and

STATE OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Plaintiffs,

v.

CVS HEALTH CORPORATION
1 CVS Drive
Woonsocket, RI 02895

and

AETNA INC.
151 Farmington Avenue
Hartford, CT 06156

Defendants.

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the States of California, Florida, Hawaii, Mississippi, and Washington (“Plaintiff States”), bring this civil antitrust action to prevent CVS Health Corporation from acquiring Aetna Inc.

I. Introduction

1. CVS’s proposed \$69 billion acquisition of Aetna would combine two of the country’s leading sellers of individual prescription drug plans, also known as individual PDPs. More than 20 million individual beneficiaries—primarily seniors and persons with disabilities—rely on these government-sponsored plans for prescription drug insurance coverage. Competition between CVS and Aetna to sell individual PDPs has resulted in lower premiums, better service, and more innovative products. The proposed acquisition would eliminate this valuable competition, harming beneficiaries, taxpayers, and the federal government, which pays for a large portion of beneficiaries’ prescription drug coverage.

2. While CVS and Aetna compete throughout the United States, they are particularly strong in 16 geographic regions established by the Centers for Medicare & Medicaid Services (“CMS”). In these 16 regions, over 9.3 million people are enrolled in individual PDPs. Competition between CVS and Aetna is particularly important in these regions because they compete for similar customers by lowering prices and improving products. Moreover, they are two of the largest and fastest-growing competitors. Individuals in these 16 regions will experience harm, including price increases and quality reductions, from the loss of competition between CVS and Aetna.

3. Because the transaction likely would substantially lessen competition between CVS and Aetna for individual PDPs in these 16 regions, the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. Background

A. Medicare Drug Coverage

4. Medicare is a federal program that provides health insurance to qualified beneficiaries. Medicare offers coverage for outpatient prescription drugs under the Medicare Part D program, which harnesses competition between private insurance companies in order to lower prescription drug costs for Medicare beneficiaries and taxpayers, enhance plan designs, and improve quality of coverage.

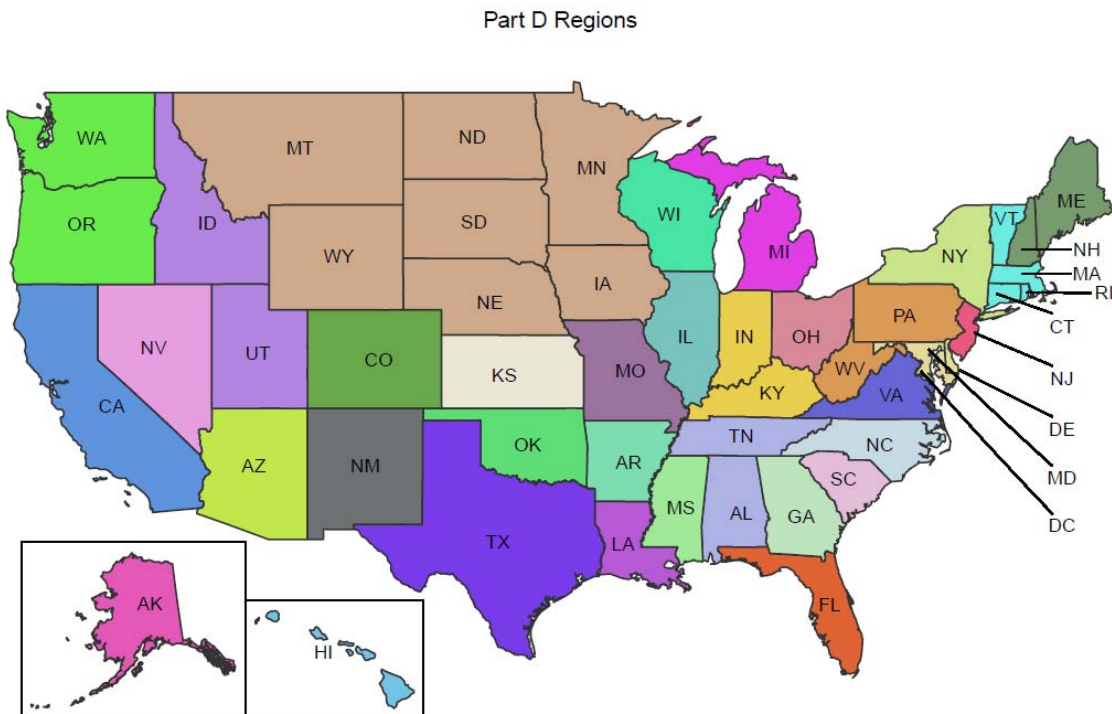
5. Medicare beneficiaries obtain individual drug coverage in two main ways, depending on the type of medical insurance they have. Beneficiaries enrolled in Original Medicare, a fee-for-service program offered directly through the federal government, can enroll in a standalone individual PDP. Beneficiaries enrolled in Medicare Advantage, a type of private insurance offered by companies that contract with the federal government, can enroll in a plan that includes drug coverage.

6. No matter how beneficiaries obtain Medicare drug coverage, the federal government subsidizes the cost of that coverage. As explained in greater detail below, the federal government also provides additional subsidies to low-income beneficiaries under the low-income subsidy (“LIS”) program.

B. Individual PDPs

7. Individual PDPs provide beneficiaries with insurance coverage for a set of prescription drugs (the “formulary”), a network of pharmacies where beneficiaries may fill prescriptions, and a set schedule of defined premiums and cost-sharing rates.

8. To offer individual PDPs, insurers must be approved by CMS. CMS has divided the 50 states and the District of Columbia into 34 Part D regions. To offer an individual PDP in a Part D region, the insurer must offer the plan at the same price to all individuals in the region and have a pharmacy network that is adequate to serve individuals throughout the region. No Part D region is smaller than a state, and some Part D regions encompass multiple contiguous states. Beneficiaries can enroll only in individual PDPs offered in the Part D region where they reside. The following map shows the Part D regions:



9. Within each Part D region, an insurer may generally offer up to three individual PDPs. An insurer must offer one “basic” individual PDP that is actuarially equivalent to the minimum coverage required by statute but may vary in terms of premiums, deductibles, formularies, and pharmacy networks. Insurers may also offer up to two “enhanced” individual PDPs that provide additional coverage compared to the insurer’s basic individual PDP.

10. Individual PDPs vary in terms of premiums, cost sharing, drug formularies, pharmacy networks, and other characteristics. Insurers can use these different plan designs to target different types of Medicare beneficiaries based on their health, income, price sensitivity, and other factors.

11. Each fall, Medicare has an annual open-enrollment period in which beneficiaries may change their individual PDP. When comparing plans, beneficiaries consider a number of factors, including premiums, cost sharing, whether their drugs are on the formulary, and whether their preferred pharmacies are in network.

C. The Low-Income Subsidy Program

12. Most low-income beneficiaries do not have to pay a premium for their individual PDP because Medicare pays their premium up to a certain threshold called the “LIS benchmark.” Under CMS rules, beneficiaries eligible for the low-income subsidy who do not affirmatively select an individual PDP or a Medicare Advantage plan (“auto-enrollees”) are automatically enrolled in a basic individual PDP, but only one that has premiums set below the regional LIS benchmark. These auto-enrollees are assigned in proportion to the number of basic plans below the LIS benchmark. For example, if three basic individual PDPs are below the LIS benchmark in a Part D region, then each plan receives a third of new auto-enrollees in that region.

13. The LIS benchmark has important consequences for insurers. As long as an insurer's individual PDP remains below the LIS benchmark each year, the plan keeps its existing auto-enrollees and is eligible to receive a portion of new auto-enrollees. If an insurer's basic individual PDP is priced over the LIS benchmark, however, then it generally loses all of its auto-enrollees and is not eligible to receive any new auto-enrollees that year. The one exception is when an insurer's monthly premium is within a *de minimis* amount, currently \$2, above the LIS benchmark, in which case the insurer can keep its auto-enrollees if it waives the premium amount above the LIS benchmark, but the insurer is not eligible to receive any new auto-enrollees. If an insurer loses its auto-enrollees, its beneficiaries are reassigned to an individual PDP below the LIS benchmark in the same manner that new auto-enrollees are assigned.

14. As with the Part D program generally, the LIS program is designed to promote competition between insurers to lower costs for beneficiaries and taxpayers.

III. The Defendants and the Merger

15. CVS, based in Woonsocket, Rhode Island, is one of the largest companies in the United States. It operates the nation's largest retail pharmacy chain; owns a large pharmacy benefit manager called Caremark; and is the nation's second-largest provider of individual PDPs, with over 4.8 million members. CVS offers individual PDPs under the brand name SilverScript in all 50 states and the District of Columbia. In 2017, CVS earned revenues of approximately \$185 billion.

16. Aetna, based in Hartford, Connecticut, is the nation's third-largest health-insurance company and fourth-largest individual PDP insurer, with over 2 million individual PDP members. Like CVS, Aetna offers individual PDPs in all 50 states and the District of Columbia. In 2017, the company earned revenues of \$60 billion.

17. On December 3, 2017, CVS agreed to acquire Aetna for approximately \$69 billion.

IV. Jurisdiction and Venue

18. The United States brings this action, and this Court has subject-matter jurisdiction over this action, under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

19. The Plaintiff States bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. The Plaintiff States, by and through their respective Attorneys General, bring this action as *parens patriae* on behalf of and to protect the health and welfare of their citizens and the general economy of each of their states.

20. Defendants are engaged in, and their activities substantially affect, interstate commerce. CVS and Aetna sell individual PDPs, as well as other products and services, to numerous customers located throughout the United States and that insurance covers beneficiaries when they travel across state lines.

21. This Court has personal jurisdiction over each defendant under Section 12 of the Clayton Act, 15 U.S.C. § 22. CVS and Aetna both transact business in this District.

22. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391. Defendants have also consented to venue and personal jurisdiction in the District of Columbia.

V. The Relevant Markets

A. The sale of individual PDPs is a relevant market.

23. The sale of individual PDPs is a relevant market and line of commerce under Section 7 of the Clayton Act.

24. For the vast majority of beneficiaries enrolled in individual PDPs, the main alternative for prescription drug coverage—Medicare Advantage plans that include drug coverage—is not a close substitute. Beneficiaries who have enrolled in an individual PDP have, by definition, chosen Original Medicare over Medicare Advantage. These beneficiaries rarely switch between the two programs, and they are even less likely to switch to obtain alternative prescription drug coverage. Indeed, only about two percent of individual PDP members convert to Medicare Advantage plans each year during open enrollment, and an even smaller percentage of individuals convert from Medicare Advantage plans to individual PDPs.

25. Because Medicare Advantage is not a close substitute for beneficiaries enrolled in individual PDPs, CVS, Aetna, and other industry participants treat individual PDPs as distinct from other products. For example, CVS offers individual PDPs but does not offer Medicare Advantage plans. Insurers that offer Medicare Advantage plans and individual PDPs, including Aetna, separately monitor and report their individual PDP enrollment, premiums, benefits, market share, and financial performance, both internally and to investors.

26. For these reasons, individual PDPs satisfy the well-accepted “hypothetical monopolist” test set forth in the U.S. Department of Justice and Federal Trade Commission’s *2010 Horizontal Merger Guidelines*. A hypothetical monopolist selling all individual PDPs would likely impose a small but significant and non-transitory price increase because an

insufficient number of beneficiaries would switch to alternatives to make that price increase unprofitable.

B. The relevant geographic markets are 16 Part D regions.

27. As noted, a Medicare beneficiary may enroll only in the individual PDPs that CMS has approved in the Part D region where the beneficiary resides. Therefore, competition in each Part D region is limited to the insurers that CMS has approved to operate in that region.

28. For the same reason, a hypothetical monopolist selling individual PDPs in a specific Part D region could profitably impose a small but significant and non-transitory price increase because an insufficient number of beneficiaries would or could switch to alternatives outside the Part D region to make that price increase unprofitable.

29. As explained below, the proposed acquisition would likely harm competition in 16 of the 34 Part D regions: Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming. Each of these Part D regions is a relevant geographic market for the sale of individual PDPs.

VI. CVS's acquisition of Aetna will substantially lessen competition in the sale of individual PDPs in 16 Part D regions.

30. Consumers will be harmed by the transaction in 16 Part D regions covering 22 states. Over 9.3 million people are enrolled in individual PDPs in the 16 regions, 3.5 million of whom have coverage from CVS or Aetna.

31. The proposed acquisition would substantially lessen competition and harm consumers by eliminating significant head-to-head competition between CVS and Aetna. Indeed, throughout the country, CVS and Aetna have been close competitors. For example, in 2016 and

2018, CVS found that individuals leaving its individual PDPs went to Aetna more often than to any other competitor. CVS's and Aetna's individual PDPs are also among the fastest growing individual PDPs, with new-to-Medicare enrollees choosing CVS and Aetna plans at rates higher than their current market shares.

32. CVS and Aetna have sought to win individual PDP customers in various ways. For example, CVS and Aetna routinely consider each other's prices and formularies when setting prices and coverage amounts for their plans. This price competition between CVS and Aetna drives them to lower premiums, copayments, coinsurance, and deductibles.

33. CVS and Aetna have also sought to win individual PDP customers from each other by improving the quality of their services and coverage. This competition has led the companies to improve drug formularies, offer more attractive pharmacy networks, and create enhanced benefits for individuals. For example, in recent years, Aetna has made several changes to improve the coverage of its formulary and pharmacy networks to win business from CVS. That competition gave beneficiaries access to certain drugs at more affordable prices.

34. In 12 Part D regions—Arkansas, California, Florida, Georgia, Hawaii, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Ohio, and South Carolina—CVS and Aetna will account for at least 35 percent of individual PDP enrollment in highly concentrated markets, making the merger presumptively anticompetitive. *See United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (holding that market concentration can establish a presumption of anticompetitive effects).

35. In five of these Part D regions (Arkansas, Georgia, Kansas, Mississippi, Missouri), as well as four additional regions (North Carolina, Oklahoma, Wisconsin, and the multistate region of Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and

Wyoming), the merged company will account for 35 percent or more of LIS-eligible beneficiaries. When combined with other market factors, this share of low-income subsidiary beneficiaries will likely result in an additional loss of competition. Competition between CVS and Aetna in these regions has led them to lower premiums to be below the regional LIS benchmarks and *de minimis* thresholds and thus qualify for LIS auto-enrollees. These lower premiums have in turn led to lower regional LIS benchmarks because the LIS benchmarks are based on the premiums that CVS, Aetna, and other companies receive for providing Medicare drug coverage. Lower LIS benchmarks reduce taxpayer costs and costs to non-LIS beneficiaries who choose to enroll in these plans.

36. If CVS acquires Aetna, these valuable forms of competition will be lost, resulting in higher premiums for consumers and lower-quality services. In addition, because the LIS benchmark is calculated as an LIS-enrollment-weighted-average for each individual PDP region, in Part D regions where CVS and Aetna have a high percentage of LIS enrollees, the merged company would have a greater ability to influence the LIS benchmark and will be incentivized to increase its prices for individual PDPs. Higher prices increase the amount that non-LIS beneficiaries pay as well as the subsidies that the federal government pays for LIS enrollees. As a result, the merger will likely increase costs to beneficiaries, the federal government, and, ultimately, to taxpayers.

VII. Countervailing factors do not offset the anticompetitive effects of the transaction.

37. Entry of new insurers or expansion of existing insurers into the sale of individual PDPs in any Part D region is unlikely to prevent or remedy the proposed merger's anticompetitive effects. Effective entry into the sale of individual PDPs requires years of planning, millions of dollars, access to qualified personnel, and competitive contracts with

pharmacies and pharmaceutical manufacturers. Because of these barriers to entry, entry or expansion into the sale of individual PDPs is unlikely to be timely or sufficient to remedy the anticompetitive effects from this merger.

38. The proposed merger is also unlikely to generate verifiable, merger-specific efficiencies sufficient to outweigh the anticompetitive effects that are likely to occur in the sale of individual PDPs in the relevant Part D regions.

VIII. Violation Alleged

39. The effect of the proposed merger, if consummated, likely would be to lessen competition substantially in the sale of individual PDPs in each of the relevant Part D regions, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

40. In the sale of individual PDPs in each of the relevant Part D regions, the merger likely would:

- (a) eliminate significant present and future head-to-head competition between CVS and Aetna;
- (b) reduce competition generally;
- (c) raise prices to Medicare beneficiaries and taxpayers;
- (d) reduce quality; and
- (e) lessen innovation.

IX. Request for relief

41. Plaintiffs request that the Court:

- (a) adjudge CVS's proposed acquisition of Aetna to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

- (b) permanently enjoin and restrain the Defendants from carrying out the planned acquisition or any other transaction that would combine the two companies;
- (c) award Plaintiffs the costs of this action; and
- (d) award Plaintiffs other relief that the Court deems just and proper.

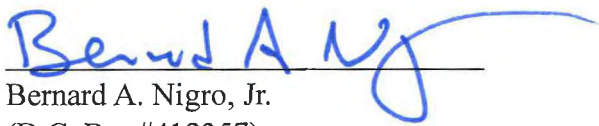
Dated: October 10, 2018

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:




Makan Delrahim
Assistant Attorney General for Antitrust



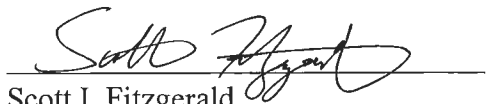
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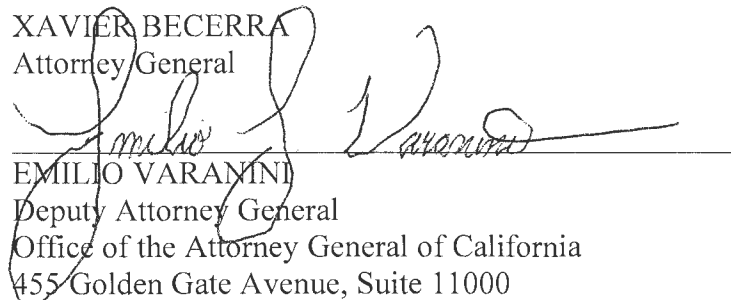
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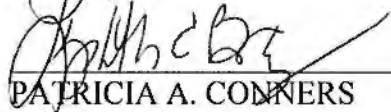


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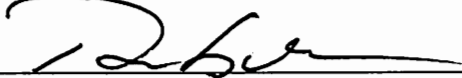
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA *et al.*,

Plaintiffs,

v.

CVS HEALTH CORPORATION

and

AETNA INC.,

Defendants.

Case No. 1:18-cv-02340-RJL

**UNITED STATES' MOTION TO CLARIFY AND AMEND
THE COURT'S PLANNED TUNNEY ACT PROCEDURE**

The United States submits this motion to ask the Court to clarify and amend its procedure for determining whether the proposed consent judgment is in the public interest. In particular, the procedure the Court has adopted for the hearing scheduled to begin June 4 excludes the United States from meaningful participation and fails to give adequate deference to the United States' prosecutorial discretion. Unless the procedure is modified as described below, the hearing would be unfair, unreliable, and contrary to the intent of Congress in passing the Tunney Act.

Argument

I. The Court should clarify and amend its procedure in advance of the hearing.

The Tunney Act procedures as currently designed in this case have two broad problems. The first is that the Court has delegated significant responsibility to amici to frame the issues that are the subject of further inquiry, without identifying how it intends to evaluate those issues in light of the United States' Complaint, Proposed Final Judgment, Competitive Impact Statement,

Explanation of Consent Decree Procedures, and Response to Public Comments (collectively, the “Tunney Act Materials”), filed with the Court as Dkt. Nos. 1, 2-1, 3, 2, and 56, respectively, which are part of the record. This leaves substantial uncertainty about how the Court will make its public-interest determination and precludes the United States from being able to prepare a meaningful response to the amici’s presentation.

The second problem is that the United States appears not to have any opportunity to test, or in any way rebut, the factual assertions that amici will make at the hearing. Although the Court previously indicated it would allow cross examination of amici’s witnesses, Dkt. No. 69 at 7 (“I, obviously, would give the Government and CVS-Aetna a chance to question the [amicus] witness, as well.”), the May 13, 2019 Order disallows all cross examination, Dkt. No. 90 at 3. The Order also excludes the two primary witnesses identified by the United States to rebut those factual assertions that amici indicated they plan to make through their witnesses.¹ By selecting all three of CVS’s requested witnesses, but not the government’s, the Court erroneously treats CVS and the United States as having an identity of interests. They do not; CVS and the United States are adverse parties that reached a compromise to resolve their dispute through settlement. CVS cannot stand in place of the United States to defend the public interest in the proposed consent judgment or the government’s prosecutorial discretion in deciding which claims to litigate, whether to settle, and on what terms to settle. In short, as currently envisioned, amici’s presentation of evidence at the Tunney Act hearing will go entirely untested by the United States and have very little, if any, indicia of reliability.

¹ The United States continues to assert that testimony beyond the scope of the adequacy of the proposed consent judgment to remedy the antitrust violations alleged in the complaint, including as to any potential harm from the transaction not alleged in the complaint, should be excluded from the hearing and the Court’s public-interest determination. Given the Court’s ruling otherwise, Dkt. No. 90, however, the United States must be given the opportunity to test and rebut those assertions as well, which may require testimony or written submissions from additional witnesses not named in the United States’ prior witness list filing, *see* Dkt. No. 84 at 2–3.

To resolve these problems, as explained in greater detail in subsequent sections below, the Court should clarify or amend its planned Tunney Act procedure in three ways. First, the Court should expressly find that the Tunney Act Materials provide a factual basis for concluding that the proposed consent judgment is a reasonably adequate remedy for the harm alleged in the Complaint and that, absent reliable evidence showing otherwise, the Court will enter the judgment without requiring further evidence from the United States. Second, the Court should restructure the hearing to give the United States the opportunity to participate through cross-examination and—if the Court still has concerns at the conclusion of the hearing about whether the proposed consent judgment is in the public interest—give the United States adequate notice and a meaningful opportunity to present a rebuttal case at a later date. Third, at a minimum, the Court should limit the scope of amici witnesses’ testimony at the hearing to the objections that amici clearly and specifically raised, and the evidence and argument amici provided to the United States, during the comment process. Finally, to avoid the substantial prejudice to the parties and amici that would result from the absence of advanced notice of the Court’s decision on these requests, the Court should rule on this motion sufficiently in advance of the hearing so that the participants have adequate opportunity to adjust their presentation as needed.

II. The Court should find that the Tunney Act Materials provide a factual basis for concluding that the proposed consent judgment is a reasonably adequate remedy for the harm alleged in the complaint.

The Court has accepted the Tunney Act Materials as part of the evidentiary record. *See* Dkt. No. 90. It has also stated that the United States “will not be required to offer . . . any evidence at all” at the hearing, *id.* at 3, and that any further evidence from the United States is limited to rebutting amici witnesses. Dkt. No. 70. In light of this and given the procedural posture of this case, the next logical step for the Court is to explain why this is so: because the

United States has complied with the Tunney Act's requirements, and the Tunney Act Materials provide a factual basis for concluding that the proposed consent judgment is a reasonably adequate remedy for the harm alleged in the complaint. The Court should make this finding express, before the hearing, and clarify that, in the absence of reliable evidence to the contrary, it will enter the proposed consent judgment. This clarification is necessary in this case to give the parties adequate notice of the state of play in advance of the hearing so that they may tailor their presentations accordingly.

The Tunney Act imposes substantial obligations on the United States and requires it to make significant and substantive filings with the Court during the administrative process. For instance, the United States must file the proposed consent judgment, a competitive impact statement explaining why the United States has proposed the consent judgment to resolve its enforcement action, and a response to the public comments on its proposal. 15 U.S.C. § 16(b)–(d). The competitive impact statement alone obligates the United States to file a detailed description and explanation of “the nature and purpose of the proceeding,” and an explanation of the proposed consent judgment.

No one disputes that the United States has complied with the Tunney Act's requirements in this case. If the Court believes that the United States has not complied with these requirements, the United States requests that the Court advise the United States now and defer further proceedings until any deficiencies can be addressed. Absent that circumstance, the Court should find that the Tunney Act Materials provide a “factual basis for concluding that the [remedy in the proposed consent judgment] is a reasonably adequate remedy for the harm predicted in the Complaint.” *United States v. Abitibi-Consol. Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008); *accord, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir.

1995); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016); *United States v. Sinclair Broad. Grp., Inc.*, 74 F. Supp. 3d 468, 473 (D.D.C. 2014); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010). The Court should further clarify that, in the absence of reliable evidence that the proposal is “so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest,’” the court will enter the proposed consent judgment, without requiring any further evidence. *Microsoft*, 56 F.3d at 1461.

Crediting the Tunney Act Materials in this way makes sense as a practical matter and affords the appropriate deference to the judgment of the United States. The United States is uniquely situated to assist the Court in answering whether the settlement it entered into in its prosecutorial discretion is in the public interest. Among other reasons, the United States spent almost a year investigating the potential substantial lessening of competition as a result of the merger between CVS and Aetna—including a detailed investigation of whether the proposed divestiture to WellCare would remedy those concerns. It received millions of documents, analyzed significant amounts of proprietary data, and interviewed more than one hundred market participants around the country. Reflecting this, the United States’ predictions with respect to the efficacy of the remedy are to be afforded deference by the Court. *See, e.g., Microsoft*, 56 F.3d at 1461 (recognizing courts should give “due respect to the Justice Department’s . . . view of the nature of its case”); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) (“In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.” (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting “the deferential

review to which the government’s proposed remedy is accorded”); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (“A district court must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.”). *Cf. SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) (analogizing review of SEC consent decree to the Tunney Act and stating “the court should have deferred to the agency’s decision that the decree is appropriate and simply ensured that the proposed judgment is reasonable”).

Moreover, crediting the Tunney Act Materials gives effect to the balance Congress struck in the Tunney Act between a court’s need to “obtain the necessary information to make its determination that the proposed consent decree is in the public interest” with the government’s need to “preserve the consent decree as a viable settlement option.” S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (June 30, 1973). On the one hand, this treatment recognizes that the court may exercise its discretion to inquire further into the reasonableness of the remedy proposed in the consent judgment. *See* 15 U.S.C. § 16(f). On the other hand, it ensures the proposed consent judgment is not subjected to full-blown litigation in the ordinary course—for if that were the case, the consent judgment would cease to be “a viable settlement option,” S. Rep. No. 93-298, at 6, which would hinder rather than help government enforcement. “Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere.” *Id.* at 5.

Finally, crediting the Tunney Act Materials comports with the presumption of regularity, which applies to Executive Branch officials’ “prosecutorial decisions” and requires that, “in the absence of clear evidence to the contrary, courts presume that [officials] have properly discharged their official duties.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting

United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)); accord *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 17 (2001). That presumption of regularity is particularly important when, as here, a court is asked “to exercise judicial power over a ‘special province’ of the Executive.”” *Armstrong*, 517 U.S. at 464 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). It helps to ensure minimal litigation intrusion in the United States’ prosecutorial decisions and gives the necessary deference to the United States’ primary role in deciding which claims to investigate, which claims to test through litigation, and which claims to settle. The Court should therefore apply it in this case by crediting the Tunney Act Materials and notifying the parties of its intent to do so in advance of the hearing.

III. The Court should restructure the hearing to allow the United States a meaningful opportunity to participate.

Notwithstanding the United States’ central role in reviewing this merger, the upcoming evidentiary hearing on June 4 eliminates the United States’ ability to participate in any meaningful way. *See* Dkt. No 90. In particular, despite serious concerns about the reliability of amici’s proposed testimony, *see* Dkt. No. 82, the United States has been prohibited from cross-examining those witnesses, and it has been denied the opportunity to rebut that testimony with its own witnesses. This violates fundamental principles of procedural fairness. At best, this approach will leave the court with an incomplete picture of the merits of the proposed settlement. At worst, it risks leading to a result that harms consumers. It would be clear error for the Court to rely on evidence introduced in such a flawed hearing to refuse to enter the proposed consent judgment.

Accordingly, as explained below, the United States asks the Court to restructure the hearing in a way that allows the United States to participate and—if the Court still has concerns at the conclusion of the hearing about whether the proposed Final Judgment is in the public interest—allows the United States to present a rebuttal case at a later date.

A. The United States should be given a meaningful opportunity to cross examine all witnesses.

The hearing is currently set up to accept unreliable testimony from amici. *See* Dkt. Nos. 82 and 84 (describing problems with amici’s proposed testimony). Testimony from these witnesses may also have the effect of misleading the Court about the true nature of the divestiture of Aetna’s individual PDP business to WellCare.

This problem is exacerbated by the lack of any opportunity to expose the potential weaknesses, inconsistencies, or inaccuracies of this testimony. Ordinarily, these types of flaws could be highlighted through cross-examination or the introduction of rebuttal evidence. The Supreme Court has recognized that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993); *see also California v. Green*, 399 U.S. 149, 158 (1970) (describing cross-examination as “the greatest legal engine ever invented for the discovery of truth” (internal quotations omitted)); *cf., e.g., Alexander v. FBI*, 198 F.R.D. 306, 320 (D.D.C. 2000) (describing the ability to cross-examine the witness as an “indicia of reliability” that supports the admission of certain hearsay testimony).

To allow for adequate testing of the reliability of the witnesses at the hearing, the Court should give the United States an opportunity to cross examine each witness for a time that is no less than that allotted for direct testimony.² Among other things, this will help mitigate the one-

² Because of the prejudice to the United States described in the United States’ Motion to Limit the Scope of the Tunney Act Hearing and Exclude Irrelevant and Undisclosed Testimony, the United States objects to the Court’s decision to conduct the June 4–6 hearing without first requiring amici to disclose the conclusions, facts, and analyses which these witnesses intend to rely on at least three weeks in advance of the hearing, facilitating the penetrating cross-examination contemplated by our adversarial system. *See* Dkt No. 82 at 10–13. In light of this decision, as explained in the next subsection, if the Court is not satisfied that the proposed consent judgment is in the public interest at the conclusion of that hearing, the Court should, among other things, order amici to turn over these

sidedness of the proceeding and increase the likelihood that the hearing crystallizes which, if any, issues have merit.

B. The United States should be given adequate notice and a meaningful opportunity to present a rebuttal case if the Court is unsatisfied that the proposed consent judgment is in the public interest following the hearing.

The Court's May 13th Order also deprives the United States of the opportunity to introduce rebuttal evidence to demonstrate faulty factual assumptions and analyses made by amici's witnesses. The Court has excluded two rebuttal witnesses listed by the United States without any explanation or notice of the standard applied by the Court in reaching that decision. Based on the description of planned amici testimony, these witnesses would present relevant rebuttal evidence, and refusing to hear from them would leave the factual record incomplete. For example, the Court expressed a desire to "understand[] . . . how participants in markets for individual prescription drug plans ("PDPs") are affected by markets for pharmacy benefit management ("PBM") services," as well as "the ways the divestiture remedy may be affected by PBM markets." Dkt. No 90 at 3. Yet, the Court rejected proposed testimony from WellCare's Executive Vice President of Clinical Operations and Business Development, Michael Radu, regarding WellCare's interaction with PBMs, and rejected proposed testimony from Dr. Nicholas Hill that would rebut expected testimony from Dr. Neeraj Sood and American Antitrust Institute's Diana Moss regarding the likelihood of whether PBM services are used to foreclose competition in the individual PDP market. *See* Dkt. No. 84.

Despite the Court's selection of three witnesses "[f]or the Government and CVS," the United States is not seeking the testimony of Dr. Alan Lotvin or Dr. Lawrence Wu, and they are

materials and give the United States the opportunity to recall amici's witnesses for cross examination no fewer than three weeks after the United States receives the disclosures.

not the United States' witnesses.³ Because CVS's and the United States' interests are not the same, CVS cannot stand in the place of the United States in this proceeding. As a government agency and plaintiff in this matter, the United States is seeking to enforce the antitrust laws to protect consumers and ensure that the consent judgment reasonably addresses the harm alleged in the complaint. *See Iron Mountain, Inc.*, 217 F. Supp. 3d at 152–53. The United States also has a deep and ongoing interest in how the Tunney Act, Clayton Act, and other antitrust laws are applied to ensure appropriate enforcement of the substance of, and procedures arising from, these laws. As a defendant, however, CVS is focused on getting the consent judgment approved. Because of these differing interests, the United States should not be forced to rely on the witnesses proposed by CVS. It would therefore be error to allow only CVS to rebut amici's witnesses, and it would likewise be an error to restrict without reason the United States' ability to present the evidence it deems necessary in rebuttal.

This exclusion is particularly problematic here because it eliminates the views of the United States. As explained in more detail in the Response to Comments, Dkt. No. 56 at 2–8, the Court “must accord due respect to the government’s prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case.” *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003); *see also United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 74–75 (D.D.C. 2014) (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements). By excluding the United States' proposed witnesses, the Court is thus not only depriving itself of the

³ The United States cross-designated CVS's witness, Terri Swanson, to provide notice that its expert would rely on portions of her testimony. Dkt. No. 84 at 5.

government's views—the information most relevant to the public-interest determination—but also the views that the Court *must* defer to in making its determination.

At the same time, the United States may not need to present a rebuttal case if, after the hearing, the Court determines that the proposed consent judgment is in the public interest. The Court should do so, without further inquiry, if amici's evidence is unreliable or insufficient to demonstrate that the remedies in the proposed consent judgment are “so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest.’” *Microsoft*, 56 F.3d at 1461. Accordingly, to avoid an unnecessary waste of judicial, government, and participant resources, the Court should allow oral argument or briefing at the conclusion of the hearing to determine whether further proceedings are required.

If, following this argument or briefing, the presentation of concerns offered by amici and the factual background offered by CVS leave the Court with questions about whether the proposed consent judgment is in the public interest, the Court should give the United States notice of what issues it considers relevant and disputed. This notice would provide basic procedural fairness and give the United States a meaningful opportunity to prepare its rebuttal case. Then, no sooner than three weeks after the Court has informed the United States of the relevant and disputed issues, the Court should allow the United States to present the witnesses, declarations, or other evidence that the United States deems necessary to resolve the disputes identified by the Court. (As stated in note 2, *supra*, because the Court declined to require expert disclosures before the June 4 hearing, if the case proceeds to rebuttal stage, the Court should also require amici to make those disclosures, give the United States at least three weeks from the receipt of those disclosures before any hearing, and authorize the United States to recall any witnesses it deems necessary, who could at that point be fully and reliably cross-examined with

the benefit of proper notice and preparation.) The process should conclude with briefing, which would allow the participants to summarize the evidence before the Court and describe any legal issues that should be considered in the Court's determination.

By restructuring the Court's planned Tunney Act procedure in this way, the Court would give the United States a meaningful opportunity to participate in the proceedings, test the reliability of the amici's evidence, and rebut that evidence as needed. The Court would then have the benefit of a record produced through a fair and orderly process.

IV. The Court should limit the scope of the amici witnesses' testimony to the objections that amici clearly and specifically raised, and the evidence and arguments provided to the United States, during the comment process.

As explained above, the proposed restructuring ensures the United States can meaningfully participate in the Tunney Act proceedings upon adequate notice of the issues in dispute. Regardless of whether the Court restructures the hearing as proposed, however, it should limit the amici witnesses' testimony to the specific arguments and evidence that the amici submitted to the government during the comments process, for two reasons.

First, limiting amici's presentation to the issues that they raised during the comments process would make the Tunney Act's administrative proceedings more effective because the United States would have an opportunity to respond to amici's concerns. If, on the other hand, amici could inject new issues into the Tunney Act proceeding at any time, the substantial obligations on the United States during the mandated administrative process, including the obligation to respond to the comments received, would not fulfill the purpose that Congress intended.

In the vast majority of cases, the Tunney Act's administrative process generates the universe of information necessary for the court to make its public-interest determination. The

mandatory process is substantial. Among other things, the United States “shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement” explaining the proposed consent judgment, “shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b),” and “shall file with the district court and cause to be published in the Federal Register a response to such comments.” 15 U.S.C. § 16(b), (d). Given this, “[t]he Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone.” *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000); accord *United States v. US Airways Grp., Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014); see 15 U.S.C. § 16(e)(2) (“Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.”). Courts therefore almost always enter proposed consent judgments under the Tunney Act without requiring further proceedings.⁴ Such efficient resolution of Tunney Act cases would not be possible, however, if amici were permitted to expand the disputed issues indefinitely.

Second, limiting amici’s presentation to the issues that they raised during the comments process allows for an orderly process and reinforces the appropriate division of authority between the Executive and Judiciary branches. It gives the government “the first crack” at considering any objections to the proposed consent judgment and acting as the initial factfinder to assess whether, and how, to address them. *Cf. Camelot Terrace, Inc. v. Nat’l Labor Relations Bd.*, 824 F.3d 1085, 1092 (D.C. Cir. 2016) (reviewing an NLRB decision).

⁴ See, e.g., *United States v. Anheuser-Busch Inbev SA/NV and SABMiller PLC*, 1:16-cv-01483 (D.D.C. Oct. 10, 2018); *United States v. Verso Paper Corp. and NewPage Holdings Inc.*, 1:14-cv-2216 (D.D.C. Dec. 11, 2015); *United States and Plaintiff States v. Comcast Corp.*, 1:11-cv-00106 (D.D.C. Feb. 22, 2011); *United States v. KeySpan Corp.*, 1:10-cv-01415 (S.D.N.Y. Feb. 2, 2011).

As the Supreme Court has held, when Congress creates obligations of this nature, certain processes necessarily attend these obligations: “We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.” *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952) (footnotes omitted). “Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Id.* at 37; *see Woodford v. Ngo*, 548 U.S. 81, 90–91 (2006) (quoting *L. A. Tucker*, applying principle to the Prison Litigation Reform Act, and observing that “no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings”); *Mingo Logan Coal Co. v. Env’tl. Prot. Agency*, 829 F.3d 710, 719 (D.C. Cir. 2016) (quoting *L. A. Tucker* and applying principle to EPA’s decision to withdraw approval of permit); *Camelot Terrace*, 824 F.3d at 1092 (quoting *L. A. Tucker* and applying principle to NLRB’s decision requiring companies to reimburse union bargaining costs).

This Court should so limit amici’s evidence at the hearing for the same reasons. As stated in *L. A. Tucker*, “simple fairness” demands it, particularly if the United States has no additional opportunity to test or rebut that evidence.

Conclusion

For the foregoing reasons, the United States respectfully requests that the Court clarify and amend the Court’s proposed procedures in this Tunney Act proceeding as detailed and set forth in the attached proposed order. In addition, to avoid the substantial prejudice to the parties

and amici that would result from the absence of advanced notice of the Court's decision on these requests, the United States asks that the Court rule on this motion sufficiently in advance of the hearing that the participants have adequate opportunity to adjust their presentation as needed.

Dated: May 24, 2019

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7(m)

Pursuant to D.D.C. Local Civil Rule 7(m), I hereby certify that I discussed the foregoing Motion with counsel for CVS. CVS does not oppose the relief sought in this motion.

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CERTIFICATE OF SERVICE

I, Jay D. Owen, hereby certify that on May 24, 2019, I caused a copy of the foregoing document to be served upon Plaintiffs State of California, State of Florida, State of Hawaii, State of Washington, and Defendants CVS Health Corporation and Aetna Inc., via the Court's CM/ECF system, and to be served upon Plaintiff State of Mississippi by mailing the document electronically to its duly authorized legal representative:

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA *et al.*,

Plaintiffs,

v.

CVS HEALTH CORPORATION

and

AETNA INC.,

Defendants.

Case No. 1:18-cv-02340-RJL

**UNITED STATES' WITNESS LIST AND REQUEST FOR CLARIFICATION
OF PROCEDURES FOR TUNNEY ACT HEARING**

In response to the Court's April 8, 2019 Order, the United States provides the following list of witnesses it proposes to call at any upcoming Tunney Act hearing.¹ The witnesses will be prepared to provide further evidence that the proposed Final Judgment is in the public interest because the proposed judgment reasonably addresses the violations alleged in the Complaint. As detailed in the United States' previous filings (*see, e.g.*, Dkts # 3, 32, and 56), to meet this standard, the United States must only show that the proposed final judgment is a "reasonably adequate remed[y] for the alleged harm," and is therefore in the public interest. *See United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152-53 (D.D.C. 2016). The witnesses'

¹ The United States interprets the Court's order to allow the plaintiffs to offer three witnesses, combined, *and* the defendants to offer three witnesses, combined, but recognizes there may be potential ambiguity in the Order about what the Court meant by "combined." If the Court instead meant to limit plaintiffs and defendants to a total of three witnesses among them, the United States requests a modification of the April 8, 2019 Order to allow the United States, CVS, and Aetna to call all five of their designated witnesses. The United States has streamlined its planned testimony as much as possible; accordingly, failure to make such a modification, if needed, could unfairly prejudice the United States' ability to rebut the seven witnesses that the Court-approved amici intend to present to the Court.

testimony will further corroborate that the proposed Final Judgment satisfies the public-interest standard by providing comprehensive relief that provides WellCare with the assets and scale necessary to maintain competition in the 16 geographic regions identified in the Complaint.

Since the Court issued its Order, the United States has filed two motions to help prepare for any such hearing: On April 18, the United States moved the Court to incorporate the Tunney Act materials as part of the evidentiary record. Dkt. #73. On April 29, the United States moved the Court to limit the scope of the hearing and exclude irrelevant and undisclosed testimony. Dkt. #82.

The first filing is consistent with the Court's Order that the United States may "rebut" amici's evidence at the hearing, as well as the United States' understanding of the appropriate scope of Tunney Act proceedings. As explained in the filing, the Court can and should accept the Tunney Act Materials as evidence that (1) the United States has complied with all Tunney Act procedural requirements and (2) the proposed final judgment reasonably remedies the violations in the Complaint in a manner consistent with the public interest. Should amici put forward evidence suggesting otherwise, the United States may rebut that showing, if necessary, at the hearing.

The second filing explains that any hearing should be limited to evidence and arguments addressing whether the proposed decree is consistent with the public interest as a remedy for the violations alleged in the Complaint, and that amici should be limited to arguments for which they have provided sufficient notice.

If the Court denies these motions, the United States requests notice of at least three weeks following any additional submissions from amici or clarifications from the Court to allow it to have an adequate opportunity to prepare and supplement its witness list as necessary.

The United States also requests three weeks’ notice of—and an opportunity to be heard on—any issues the Court deems relevant to its public-interest determination that are beyond amici’s previously identified challenges to the adequacy of the remedy in the proposed consent judgment. If the Court denies the United States’ motions or does not allow supplemental witnesses if necessary, it would unfairly prejudice the United States by forcing it to prepare for a hearing without proper notice of the scope of the hearing or the context in which the Court intends to evaluate the evidence presented.

In addition, the United States requests that the Court allow it to provide a short opening statement and closing argument of 20 minutes each. Allowing a short opening statement and closing argument would enable the United States to frame the relevant issues before the Court and put the witness testimony in context.²

Witnesses

Fact Witness: Michael Radu

Knowledge and Expertise

Michael Radu is the Executive Vice President of Clinical Operations and Business Development for WellCare. In his current role, Mr. Radu leads WellCare’s clinical services operations and pharmacy relationships. Mr. Radu’s responsibilities include profit-and-loss responsibility for WellCare’s individual PDP business throughout the United States. Before his current role, Mr. Radu had 25 years of experience in the managed-care industry, including work related to Medicaid and Medicare health plan management.

² The United States has consulted with counsel for CVS, who does not oppose the requests for clarification.

Mr. Radu holds a bachelor's degree in psychology from the University of California, Los Angeles and an MBA from the University of Southern California Marshall School of Business. Mr. Radu's resume is attached as Exhibit A.

Proposed Testimony

This section describes the topics about which Mr. Radu is prepared to testify, and is limited to topics that rebut the testimony that amici proposed to offer in their filings of April 19 or other previously disclosed materials. This representation regarding Mr. Radu's ability to testify to these topics is not intended to alter in any way the United States' position that the scope of the proposed evidentiary hearing should be limited as described in its pending motions.

Due to his position and responsibilities at WellCare, Mr. Radu is familiar with WellCare's individual PDP business, including the competition it faces, WellCare's decision to purchase Aetna's individual PDP assets, and WellCare's integration of those assets. Mr. Radu is prepared to testify that WellCare is familiar with the individual PDP market and has been a competitor in individual PDP since the program's inception in 2006, and that the divestiture assets will likely enable WellCare to maintain and even improve its competitive offerings in the marketplace. Mr. Radu is further prepared to testify that WellCare has experience successfully integrating individual PDP assets, that the divestiture assets include what WellCare needs to keep the assets competitive, and that the Aetna data received during the divestiture augments and complements the nationwide infrastructure already possessed by WellCare.

With respect to the divestiture purchase price, Mr. Radu is prepared to testify that WellCare undertook its own analysis of Aetna's individual PDP business, that WellCare's bid for the divestiture assets reflects the reasonable value of the assets under the circumstances of the divestiture. Mr. Radu will also testify that WellCare made an independent decision to contract

with Caremark, CVS's pharmacy benefit manager ("PBM"), that this decision was in the best financial interest of WellCare, that WellCare is putting its PBM services contract out for bid in the near future, and that WellCare has competitive options for the PBM and retail pharmacy services that it requires.

In addition to the testimony described above, the United States, subject to its pending motions, reserves the right to call Mr. Radu to rebut any other testimony or evidence entered into the record by amici's witnesses.

Approximate Length of Testimony

Two hours.

Fact Witness: Terri Swanson

The United States understands that CVS intends to designate Terri Swanson, the Vice President of Medicare Product and Part D business at Aetna, as a witness. The United States hereby cross-designates Ms. Swanson as a witness for the same proposed testimony detailed in CVS's witness list.

Approximate Length of Testimony

One hour.

Expert Witness: Dr. Nicholas Hill

Knowledge and Expertise

Dr. Nicholas Hill is an expert in antitrust economics in a number of industries, including healthcare. He has provided economic analysis in a wide range of antitrust healthcare matters involving hospitals, health insurers, and pharmaceutical companies. Dr. Hill spent 2006-2017 in government service, including time as an assistant section chief in the Economic Analysis Group at the Antitrust Division of the Department of Justice and as an economist in the Bureau of

Economics at the Federal Trade Commission. At the Antitrust Division, he received the U.S. Attorney General's Award for Distinguished Service. He is currently a partner at the Bates White Economic Consulting Group and has a PhD in Economics from Johns Hopkins University where he was a visiting professor in the fall of 2007. He also has a bachelor of arts in economics and international studies and a masters in science (MSc) in quantitative development economics from the University of Warwick.

During his time at the Department of Justice and the Federal Trade Commission, Dr. Hill provided economic analysis in a number of healthcare matters. He also analyzed over 20 proposed divestitures in a variety of industries and provided a written declaration in a prior Tunney Act proceeding. A copy of Dr. Hill's CV is attached as Exhibit B.

Proposed Testimony

This section describes the topics about which Dr. Hill is prepared to testify, and is limited to topics that rebut the testimony that amici proposed to offer in their filings of April 19 or other previously disclosed materials. This representation regarding Dr. Hill's ability to testify to these topics is not intended to alter in any way the United States' position that the scope of the proposed evidentiary hearing should be limited as described in its pending motions. The United States continues to maintain that experts should have to disclose their analyses and sources prior to any hearing, and with sufficient time for the other side to prepare. If the Court disagrees and allows amici's expert witnesses to testify based on the material currently not in the record, then Dr. Hill should also be allowed to testify to expert opinions, or rely on materials, not described in this filing.

Dr. Hill is prepared to testify about competition and consumer welfare in the sale of individual PDPs. He can interpret public information about individual PDP markets, including

enrollment³ and financial data,⁴ and can testify to the likelihood of various outcomes from the proposed divestiture from Aetna to WellCare. Dr. Hill's testimony will specifically rebut three arguments contained in amici's filings.

First, Dr. Hill is prepared to testify that, based on an economic analysis of the proposed remedy, the divestiture to WellCare is likely to maintain the competitiveness of individual PDP markets. Relying on public enrollment data as well as interviews with and testimony from Mike Radu, a WellCare executive listed above, Dr. Hill can testify that WellCare is an experienced competitor for individual PDPs. Relying on this same information, Dr. Hill can testify that the divestiture will likely maintain the level of pre-merger competition in the relevant markets. Dr. Hill can also testify that the divestiture will strengthen WellCare by increasing its scale and providing it with data, contracts, and expertise that will enable it to take advantage of that increased scale.

Dr. Hill can also testify that WellCare's past experience, including its 2013 acquisition of Windsor Health Group, demonstrates its ability to successfully integrate individual PDP plans and that publicly available enrollment data shows that WellCare successfully retained most of the Windsor enrollment during the years following the acquisition.

Relying on his experience as an antitrust economist who was involved in over 20 remedies as well as a review of the economic literature on this subject, Dr. Hill can also testify that the divestiture to WellCare is made to a qualified buyer and includes all necessary assets and is therefore likely to preserve competition. Dr. Hill can testify that WellCare has been an active

³ Available at: <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MCRAAdvPartDENrolData/Monthly-Enrollment-by-Contract-Plan-State-County.html> and <https://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovGenIn/index.html> .

⁴ Available at: <https://www.cms.gov/Medicare/Medicare-Advantage/Plan-Payment/Downloads/CY2014-MLR-Data-Release-File.zip> .

participant in individual PDP markets since their inception in 2006; that WellCare already has pharmacy networks throughout the United States; that the divestiture includes Aetna's entire individual PDP business; and that WellCare has received a valuable set of data and expertise through the divestiture.

Dr. Hill is prepared to address any claim that the WellCare divestiture is in any way similar—from the perspective of antitrust economic analysis—to the proposed divestiture to Molina in the *Aetna/Humana* case. Based on publicly available information in the *Aetna/Humana* trial record,⁵ Dr. Hill is prepared to contrast the robust divestiture in this matter with the rejected remedy in *Aetna/Humana*. Dr. Hill can testify that Molina (the proposed buyer in *Aetna/Humana*) had tried, and failed, to enter the relevant markets; that Molina had no presence, and hence no provider networks, in any states in which lives were to be divested; that Molina would not have received an entire line of business; and that Molina would not have received access to a comprehensive set of data or staff through the divestiture. Similarly, based on publicly available information in WellCare's corporate filings and the *Humana/Arcadian* record,⁶ Dr. Hill is prepared to testify that the divestiture in *Humana/Arcadian* is not comparable to the proposed divestiture in this matter, as the *Humana/Arcadian* divestiture was not a complete line of business and was sold to buyers without provider networks in many of the markets where the assets were acquired.

Dr. Hill could also testify that the purchase price of the divestiture in this case is not dispositive as to the assets' future competitive significance, as the pool of potential buyers of the divestiture assets was necessarily limited because of the stringent standards that antitrust enforcement agencies impose on buyers.

⁵ See *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 73 (D.D.C. 2017).

⁶ See *United States v. Humana, Inc.*, 1:12-cv-00464 (D.D.C. March 27, 2012).

Second, Dr. Hill is prepared to rebut amici's arguments that the divestiture of Aetna's individual PDP business to WellCare will create competitive issues of its own accord. Relying on public enrollment data, Dr. Hill can testify that, while the combination of WellCare and Aetna does result in HHIs in several Medicare regions that "potentially raise significant competitive concerns" relative to premerger levels, moderate concentration levels alone often do not lead to anticompetitive effects. Relying on the same enrollment data, Dr. Hill will testify that other features of the individual PDP markets, including competition from other competitors such as Humana, CVS, and UnitedHealth, and the fact that WellCare's share was small in many individual PDP markets, do not fuel concerns related to a combination of WellCare and Aetna. Dr. Hill can also testify that other market participants such as Express Scripts had similar market profiles to WellCare and that Rite-Aid's EnvisionRx is a growing individual PDP participant, further undermining any concern regarding the elimination of WellCare as an independent competitor.

Third, Dr. Hill is prepared to testify that WellCare is unlikely to be subject to vertical foreclosure following the divestiture. Relying on publicly available enrollment data, the allegations in the Complaint, Dkt. #1, and interviews with and testimony from Terri Swanson, an Aetna executive, Dr. Hill can testify that Aetna was a strong competitor to CVS and that there is no evidence that it was foreclosed prior to the acquisition. Dr. Hill can then testify to several flaws in the numerical assessment of the profitability of foreclosure described by Dr. Sood as indicating a probability of foreclosure. Using publicly available enrollment and industry financial data, Dr. Hill can then testify to a properly formulated assessment of the profitability of foreclosure, which shows CVS has no meaningful economic incentive to foreclose WellCare from its PBM services. Based on past examples of behavior in retail pharmacy markets, Dr. Hill

can also testify that CVS would face significant financial losses if it were to foreclose WellCare from its retail pharmacies.

In addition to the testimony described above, the United States, subject to its pending motions, reserves the right to call Dr. Hill to rebut any other testimony, analysis, or evidence entered into the record by amici's witnesses, including the structure, conduct, performance analysis suggested by Dr. Sood's proposed testimony.

Approximate Length of Testimony

Four hours.

Dated: May 3, 2019

Respectfully submitted,

_____/s/_____
Jay D. Owen
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Antitrust Division
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CERTIFICATE OF SERVICE

I, Jay D. Owen, hereby certify that on May 3, 2019, I caused a copy of the foregoing document to be served upon Plaintiffs State of California, State of Florida, State of Hawaii, State of Washington, and Defendants CVS Health Corporation and Aetna Inc., via the Court's CM/ECF system, and to be served upon Plaintiff State of Mississippi by mailing the document electronically to its duly authorized legal representative:

Counsel for State of Mississippi:

Crystal Utley Secoy
Consumer Protection Division
Mississippi Attorney General's Office
P.O. Box 22947
Jackson, Mississippi 39225
Phone: (601) 359-4213
cutle@ago.state.ms.us

_____/s/_____
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Michael P. Radu

PROFESSIONAL EXPERIENCE

WELLCARE, 2015 - Current

Executive Vice President, Clinical Operations and Business Development, Tampa, FL

Executive officer and part of the leadership team that led a turnaround in a Fortune 500 health plan with \$27B in revenue (up from \$14B) serving 5.3 million Medicare, Medicaid members in 21 states and national PDPs.

Responsibilities include advancing the Company's growth strategy through leading the Company's Medicaid organic business development to expand the membership, benefits and geography of WellCare's health plans. Additionally, responsible for the P&L of WellCare's national Part D health plans, soon to be the 4th largest, currently serving close to 4 million members in all 50 states. The duties also include leading clinical and quality operations that yield material revenue improvement from Medicare STARs, Medicaid quality incentives and Medicare/Medicaid risk adjustment. Also, run PBM operations and P&L serving 1.6 million lives and an exchange health plan. Finally, created the first Company-wide Innovation Office to advance capability development, new products and strategic partnerships.

Success includes:

- Secured additional revenue from expanding Medicaid contracts into new geographies, adding new benefits and serving new chronically ill members, such as long-term care seniors, medically fragile children and seriously mentally ill adults. Responsible for expansion into North Carolina, one of the largest new Medicaid managed care RFPs in years.
- Exceeded Part D health plan profitability targets for each of the last 3 years including developing innovative Medicare Part D bid strategies and improving core operations and compliance. Championed the purchase of Aetna's divested Part D assets.
- Led a company-wide transformational quality initiative for Medicare and Medicaid that improved every area of the Company's performance including operations, product, member engagement, clinical results, member satisfaction, provider engagement and pharmacy. Results yielded the Company's first ever Medicare STARs score at 4.5 STAR (currently at over 43 percent of members in 4 STAR plans up from zero in 2015).
- Led all utilization management, care management, and behavioral health teams nationally that delivered on clinical savings initiatives exceeding hundreds of millions of dollars annually surpassing goals for 3 years. Programs included launching localized, field care management program nationally, advancing Medicare revenue accuracy programs, and hospital admission reductions of 18 percent. This success necessitated developing and deploying a propriety new utilization management clinical platform serving 4,000 associates.
- Improved employee satisfaction from 71 to 79 points while yielding turnover better than every other area and less than half the company average. Increased leadership bench strength significantly.

HEALTH ESSENTIALS, 2013 - 2015

Chief Executive Officer, Santa Ana, CA

Led a medical group, hospice and palliative care organization serving high risk Medicare and Medicaid patients through end of life wherever they reside. The Company served 2,500 high risk patients in California, Arizona and Nevada mostly under shared risk or capitation contracts, and employed over 600 associates including 50 physicians and nurse practitioners. The position held P&L responsibility for \$75 million annual revenue and responsibility for all aspects of the Company including culture, strategy, operations, board management, sales, field and support functions. Key businesses of the company included:

- A multi-state hospice organization with approximately 1,200 ongoing census covering Southern California, Las Vegas, and Tucson
- The premier nursing home based primary care medical group (SNFist) covering 300 nursing homes in Southern California and Las Vegas, and
- An innovative physician and nurse practitioner home-based care team for high risk and home bound patients in Southern California and Tucson.

UNITEDHEALTH GROUP, 2001 - 2013**Chief Operating Officer, OptumCare, Optum Reston, VA****2011 – 2013**

Part of the founding management team that created a physician medical group division within Optum, a wholly owned subsidiary of UnitedHealth Group, operating high performing networks, IPAs, ACOs as well as employed medical group practices. The division served over 1.1 million individuals through bundled payment and capitation in 8 states and 20 markets with over 3,500 employees and 450 employed physicians.

Responsibilities included P&L accountability for all markets representing close to \$4 billion in annual revenue. In addition, the position led development of corporate IPA and medical group functions such as practice management operations, sales/marketing, network development, medical management, quality and Medicare coding, claims, call center, new market development and provided oversight of all other matrix functions.

President, Southeast Region, UnitedHealthcare Reston, VA**2007 - 2011**

Part of management team that led profitability and growth turnaround of Unitedhealthcare's Medicaid division growing from \$4B to \$12B began exceeding profit targets in 2008, the first in 6 years. Responsibilities included leading the P&L of Medicaid, and Medicare health plans in 6 states serving 1 million members and \$4 billion of revenue with supervision of 650 employees representing utilization management, care management, provider relations, marketing/sales, quality, and operations.

Senior Vice President, State Public Affairs, Medicare, Washington, D.C.**2004 - 2007**

Responsible for all state policy and public affairs issues for UHC's Medicare division related to Medicare, Medicaid long term care and health care technology including the interplay of federal programs on state policy. In addition, the position required working with business owners to achieve new market development (often through procurement) and enhance program revenue.

Senior Vice President, Business Development, Evercare, Phoenix, AZ**2002 – 2004**

A member of Evercare's senior management team, an organization dedicated to serving chronically ill individuals through Medicaid and Medicare. Responsibilities included developing new market opportunities for complex populations and securing the Company's participation.

Regional Vice President, Health Plans, Phoenix AZ**2001 - 2002**

Operational and P&L responsibility for 4 states representing Medicaid and Medicare health plans serving approximately 50,000 chronically ill beneficiaries and generating almost \$300 million in annual revenue.

LIFEMARK CORPORATION (purchased by UnitedHealth Group), 1997 - 2001

Regional Vice President, Health Plans: P&L responsibility for 4 states representing at-risk and ASO Medicaid contracts serving over 400,000 members

Lifemark Plan President: Managed the Company's innovative, Medicaid Arizona long term care health plan program serving 2,500 high risk, aged and disabled individuals in 8 counties.

Lovelace Plan President: Managed statewide Medicaid health plan serving 40,000 TANF and CHIP individuals as part of an administrative services agreement for a Cigna subsidiary, Lovelace Health Plan.

FPA MEDICAL MANAGEMENT, 1996 – 1997 Administrator, Thomas-Davis Medical Group: As part of a national practice management platform, managed a multi-specialty medical group with approximately 50 physicians and 240 staff members through 6 locations.

FHP HEALTH CARE, 1989 – 1996 Administrator, Talbert Medical Group, Managed all aspects of a multi-site, primary care practice with approximately 15 physicians and 100 staff including P&L, marketing, human resources and general administration. And, served in various other corporate functional roles.

EDUCATION

M.B.A., Marketing/Finance, University of Southern California

B.A., Psychology w/ Business Emphasis, University of California, Los Angeles

NICHOLAS D. HILL, PHD

Partner

AREAS OF EXPERTISE

- Banking
- Chemicals
- Health care
- Pulp and paper
- Software
- Telecommunications



SUMMARY OF EXPERIENCE

Nicholas Hill has served as an economic expert for private clients, the Department of Justice, and the Federal Trade Commission. He has testified in federal court and the Federal Trade Commission's administrative court. He developed the capacity closure model, which is often used to analyze mergers in commodity industries. Prior to joining Bates White, Dr. Hill served as assistant section chief in the Economic Analysis Group of the Department of Justice's Antitrust Division, where he received the US Attorney General's Award for Distinguished Service, and was an economist in the Bureau of Economics at the Federal Trade Commission.

EDUCATION

- PhD, Economics, Johns Hopkins University
- MSc, Quantitative Development Economics, University of Warwick
- BA, Economics and International Studies, University of Warwick

PROFESSIONAL EXPERIENCE

- Bates White Economic Consulting, Washington, DC
 - Partner, 2018–present
 - Principal, 2017–2018
- Department of Justice
 - Assistant Section Chief, Antitrust Division, 2014–2017
 - Economist, Antitrust Division, 2006–2013
- Federal Trade Commission, Economist, Bureau of Economics, 2013–2014
- Johns Hopkins University, Visiting Professor, Fall 2007
 - Microeconomic Theory I

SELECTED EXPERIENCE

AGRICULTURE

- Retained in 2019 by a private client to provide analysis and testimony about an alleged agricultural output withholding conspiracy.
- Analyzed fluid milk and school milk competition in the Antitrust Division's litigation to undo Dean Foods' acquisition of the Foremost Farm milk-processing assets. Key contributions included writing a series of memos that helped develop the theory of harm and analyzing when and how any efficiencies created by the deal would be passed through to consumers.

CHEMICALS

- Testified in two courts 2018 on behalf of the Federal Trade Commission in the agency's litigation over the proposed merger between Tronox and Cristal, two leading suppliers of chloride process titanium dioxide. Provided key market definition analysis and modeled the likely unilateral and coordinated effects of the merger. The FTC prevailed in both courts.
- Led the analysis of economic issues on the proposed merger of Halliburton and Baker Hughes. This sprawling matter included a massive number of product markets, each of which had a unique story.

CONSUMER PRODUCTS

- Analyzed competition on three separate Antitrust Division investigations in the beer industry: Miller-Coors, InBev-Anheuser Busch, and ABI-Grupo Modelo. The InBev-Anheuser Busch matter led to the divestiture of the Labatt's brand despite the fact that Labatt's national market share was miniscule, a recognition of the economic evidence that beer markets are local (Labatt's was popular in parts of upstate New York). Similarly, economic analysis supported the divestiture of the Grupo Modelo brands in the United States, and this was the outcome of the matter.
- Provided economic analysis of competition in the sliced bread market for the Antitrust Division's investigation of the merger between Grupo Bimbo and Sara Lee Bakery Group. The transaction raised concerns about a reduction in competition to supply sliced bread to retailers in eight geographic markets in the United States. Much of the concern focused on wide-pan breads. The transaction was approved conditional on divestiture of brands in local geographic markets.
- Prepared declaration for the FTC analyzing the proposed merger between Jostens and American Achievement Corporation, two of the three largest makers of high school and college class rings. The Commission issued a complaint seeking to block the merger, charging that the proposed merger would likely be anticompetitive and lead to higher prices and reduced service. The parties abandoned their merger plans.
- Analyzed funeral home and cemetery competition in dozens of markets around the country as part of the FTC's investigation of SCI's acquisition of Stewart Enterprises. Developed a simple tool for measuring funeral home concentration. This tool helped narrow the focus of the investigation to areas in which the merger would likely reduce competition. Worked closely with the parties to negotiate the divestitures that would be required to mitigate the transaction's likely competitive effect.
- Provided economic analysis on the FTC's investigation of Pinnacle's acquisition of Ameristar's casinos. Wrote a memo that tackled key market definition issues and provided answers using simple econometric tools. Summarized the economic aspects of the investigation before the full Commission.

HEALTHCARE

- Provided an antitrust risk assessment in 2018 to a major hospital system considering whether to submit a bid to acquire another hospital system.
- Managed the economics team on the Antitrust Division's successful litigation to block the proposed merger between Aetna and Humana. Helped prepare the testimony and reports of the Division's economic, industry, divestiture, and efficiencies experts.
- Analyzed the acquisition by Novartis of GSK's oncology drugs and GSK's acquisition of Novartis's vaccine division (excluding influenza assets) for the Federal Trade Commission. Novartis agreed to divest its BRAK and MEK inhibitors assets to secure FTC approval of the deal. At the time of the transaction, GSK marketed a BRAK inhibitor, a MEK inhibitor, and a combination therapy, all of which were used to treat late-stage melanoma. Novartis had BRAK and MEK inhibitors, as well as a combination therapy, at a late-stage of development. GSK's acquisition of Novartis vaccine assets was approved without condition.
- Provided economic analysis for the FTC of Sun Pharmaceutical's acquisition of Ranbaxy Laboratories. Both firms manufactured generic drugs for sale in the United States. Sun agreed to divest Ranbaxy's generic minocycline business to insure approval of the deal by the Federal Trade Commission. The case turned on future competition: Ranbaxy provided various strength minocycline tablets and Sun was a likely future producer.
- Provided economic analysis to Antitrust Division investigations of Blue Cross Blue Shield's acquisition of M-Care, the University of Michigan's health insurance business, and Main Line Health's acquisition of the Riddle Health System. Both deals were approved without condition.

MEDIA

- Retained by Pandora in 2018 to provide economic analysis related to its acquisition by Sirius XM. The analysis focused on issues of cross-ownership. The Antitrust Division approved the merger without issuing a second request.
- Analyzed the proposed merger of two newspapers on behalf of the Antitrust Division in 2017. The merger was abandoned by the parties and the target was instead acquired by a third party.

PULP AND PAPER

- Retained by KapStone Paper and Packaging Corporation to provide analysis of the likely competitive impact of its proposed merger with WestRock. Provided economic analysis to Antitrust Division staff showing that the merger was unlikely to significantly reduce competition to produce kraft paper, in part because of vigorous competition from plastic alternatives. The merger closed without conditions in 2018.
- Provided economic analysis for the Antitrust Division on three separate paper mergers: Abitibi-Bowater, Graphic Packaging-Altivity, and International Paper-Temple Inland. In the course of these investigations, developed the capacity closure merger simulation tool. It weighs a dominant firm's incentive to increase price by closing mills (i.e., the additional margin it can earn on its mills that remain open) against the cost of such closures (i.e., lost profits at the closed mills). The model requires only data that are commonly available in the paper industry and can easily accommodate the effect of efficiencies and competitor supply responses.
- Oversaw the Antitrust Division's economic analysis of Weyerhaeuser's sale of fluff pulp mills to International Paper. The investigation closed without conditions.

RETAIL BANKING

- Retained by First Financial and MainSource in 2017 to provide competitive analysis in conjunction with their proposed merger. Analyzed small business lending overlaps in counties in Indiana, among other issues, and presented findings to the Antitrust Division. The merger closed successfully with limited divestitures.
- Led the economic analysis of all banking matters before the Antitrust Division while an Assistant Section Chief, including the mergers of Huntington-First Merit and KeyCorp-First Niagara, among others. Also oversaw the economic analysis of the merger between two subprime lenders Springleaf and OneMain.

SOFTWARE

- Retained by a private client to analyze its proposed acquisition of a firm that provided software solutions to healthcare providers. The merger closed without condition in 2019.
- Retained in 2018 by a private client to provide an antitrust risk assessment of a potential acquisition.
- Led the Antitrust Division's economic analysis of Change Healthcare's 2017 acquisition of McKesson's claim processing assets. Change had a significant presence among payers, while McKesson had a strong position among providers. The transaction closed without conditions.
- Spearheaded the economic analysis on the Antitrust Division's investigation of Nuance's acquisition of Loquendo. Both firms had developed speech-to-text software that were used in a variety of applications. The merger was approved without conditions.

TELECOM

- Managed the economics team on the Antitrust Division's investigation into the proposed merger between Comcast and Time Warner Cable. A key area of focus was how increasing the size of an MVPD affects the fees that it pays to programmers. The team used a combination of empirical and theoretical analysis to answer this question and to answer the related question of whether large Internet Service Providers (ISPs) can charge higher interconnection fees than smaller ISPs.
- Oversaw the Antitrust Division's economic analysis on its investigation into the Charter-Time Warner Cable and Century Link-Level3 mergers. Both mergers were approved with conditions.
- Supervised the economic analysis on the Antitrust Division's investigation of the merger between ARRIS and Pace, two prominent makers of set-top boxes. The merger was approved without conditions.

TRANSPORTATION

- Retained in 2017 by Siemens and Alstom, two global railroad industry firms, to analyze the likely competitive impact in the United States and Canada of their proposed merger. The team extensively supplemented existing CRM data using publicly available information and then used the resulting database to demonstrate that competition in a key segment at issue would likely not be affected by the proposed merger. The Antitrust Division of the DOJ excluded the segment from its second request.
- Oversaw the economic analysis of the Antitrust Division's litigation to block the proposed sale of slots at Newark Airport from Delta to United. The economic team used empirical analysis to support the proposed market definition (which defined Newark Airport as a separate geographic market), to measure the likely competitive effects, and to evaluate the parties' efficiency claims.

- Oversaw the Antitrust Division's economic analysis on a number of matters involving cranes, trailers, and trucks. On Ritchie Brothers' acquisition of IronPlanet, this included wrestling with the extent to which different selling mechanisms compete with one another, specifically, online auctions and physical auctions. Product and geographic market issues, meanwhile, took center stage in Big Tex's acquisition of fellow trailer manufacturer ATW. Finally, Konecranes acquisition of Terex's MHPS business focused on port cranes.

TESTIMONY, DECLARATIONS, AND EXPERT REPORTS

- *Federal Trade Commission v. Tronox Limited et al.*
 - 1:18-cv-01622-TNM (D.D.C. Sept. 12, 2018): Testimony and expert report, 2018.
 - FTC Matter/File No. 171 0085, Docket 9377: Testimony, 2018.
- US Department of Justice, Antitrust Division. Newspaper matter. Expert witness, 2017.
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RECENT PRESENTATIONS AND PANELS

- "Fundamentals of Economics," Panelist, 2019 ABA Antitrust Law Spring Meeting, March 27, 2019
- "Effective Engagement: Working with the Government." Panelist, 2018 ABA Antitrust Law Spring Meeting, April 12, 2018
- "Antitrust and the Payer-Provider Relationship: Do I Need to Care about This?" Panelist, American Health Lawyers Association webcast, October 26, 2017
- "Natural Experiments in Merger Analysis." Hal White Antitrust Conference, June 2016
- "Fundamentals of Economics." Panelist, ABA Spring Meeting, Section of Antitrust Law, April 2016

- “Economic Issues Raised in the Comcast-Time Warner Cable Merger.” Panelist, ABA Section of Antitrust Law, February 2016
- “Mergers that Enhance Purchasing Clout—Current Thinking on Monopsony and Bargaining Power.” Capitol Forum Future of Broadband Conference, 2015
- “The Economics of Efficiencies.” Antitrust Economics for Young (and Old) Lawyers, FCLI, 2015.
- Hoover IP Squared Conference. Discussant, 2015
- “US Antitrust Law Fundamentals for Chinese Practitioners Series: Basic Economics for Antitrust Lawyers.” Panelist, ABA, 2013
- Panelist, Fordham Competition Law Institute Course for Agency Economists, 2012
- Joint DOJ-FTC Data Usage Workshop, 2011
- DOJ Merger Guidelines Market Definition Training, 2011
- DOJ-EU-FTC Antitrust Workshop, 2011

HONORS AND AWARDS

- US Attorney General’s Award for Distinguished Service, 2017, Aetna–Humana
- Antitrust Division Award of Distinction, 2016, United–Delta Newark Slots
- Antitrust Division Award of Distinction, 2016, Halliburton–Baker Hughes
- Antitrust Division Award of Distinction, 2015, Comcast–Time Warner Cable
- FTC Certificate of Appreciation, 2014, Expert Witness on jewelry industry matter
- Best work by an EAG Staff Economist, Department of Justice: Written work, 2009–2010
- Best support by an EAG Staff Economist, Department of Justice: Litigation, 2008–2009
- Best work by an EAG Staff Economist, Department of Justice: Theory, 2007–2008



DEPARTMENT OF JUSTICE

Opening Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act

MAKAN DELRAHIM

Assistant Attorney General

Antitrust Division

U.S. Department of Justice

**Anne K. Bingaman Auditorium and Lecture Hall
Liberty Square Building
Washington, DC**

April 11, 2019

Good afternoon. I welcome you all here today to the Anne K. Bingaman Auditorium and Lecture Hall to discuss the Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA).¹ It is fitting that we discuss this important legislation here, in our newly-dedicated auditorium, given former AAG Bingaman's contributions to the Antitrust Division's Leniency Program. As most of you know, Anne was the Assistant Attorney General when the Antitrust Division's Corporate Leniency Policy was revised in 1993. In the twenty-five years since, the Leniency Policy has played a crucial role in the Division's ability to detect, disrupt, and deter antitrust crimes. It has resulted in the prosecution of sophisticated international cartels and the collection of billions of dollars in criminal antitrust fines. ACPERA complements the Division's Leniency Program by reducing the civil damages exposure of a company granted leniency if the company provides civil plaintiffs with timely, "satisfactory cooperation."

I was a Deputy AAG at the Division when President Bush originally signed ACPERA into law in June 2004, and I take great pride in its passage. ACPERA not only increased criminal antitrust penalties but promised to bolster the Leniency Program by allowing a company that qualifies for leniency to avoid paying treble damages in follow-on civil lawsuits. This benefit can be substantial. Under ACPERA, a leniency applicant that satisfies ACPERA's cooperation requirements is civilly liable only for the actual damages attributable to its *own* conduct, rather than being liable for three times the damages caused by the *entire* unlawful antitrust conspiracy. While treble damages liability can be an important deterrent for engaging in anticompetitive behavior, such enormous civil exposure can also have the unfortunate consequence of deterring the self-reporting of criminal wrongdoing.

¹ The Antitrust Criminal Penalty Enhancement and Reform Act, Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004), as amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), codified as amended at 15 U.S.C. § 1 (notes).

Then-Chairman Orrin Hatch, who I had the privilege of working for on the Senate Judiciary Committee before I came to the Division in 2003, predicted at the time of ACPERA's passage that its "increased self-reporting incentive will serve to further destabilize and deter the formation of criminal antitrust conspiracies. In turn, these changes will lead to more open and competitive markets."²

Proponents of ACPERA say that the detrebling provisions have promoted self-disclosure and have streamlined civil antitrust litigation, just as Senator Hatch predicted. Some have recently raised concerns that ACPERA is no longer working as it was intended. That is what we are here to explore.

In my view, tools such as ACPERA's detrebling provisions that have the potential to incentivize leniency and encourage self-reporting are of great value because they help to protect consumers from the significant harm a cartel can cause when it infects a particular industry.

At Congress's request, in 2010, the Government Accountability Office published a report on ACPERA, which I am sure will be discussed today.³ In reviewing and commenting on the report, the Division recognized then that increased leniency applications since ACPERA's enactment "provide[d] some circumstantial evidence of the value of both ACPERA's increase in penalties and its detrebling relief" to the Leniency Program.

Despite some recent eulogies over the purported death of leniency, the Division's Leniency Program is still alive and well. In fact, the number of leniency applications the Division received in 2018 was on par with our historical averages.

² 150 Cong. Rec. S3614, H6327 (Apr. 2, 2004) (statement of Sen. Hatch).

³ GAO Report to Congressional Committees, Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection (July 2011), <https://www.gao.gov/products/GAO-11-619>.

There's no sign that we've become a victim of our own success and rooted out collusion entirely. Indeed, the Division is vigorously investigating cartel conduct and closed FY 2018 with 91 pending grand jury investigations—the highest total since 2010. So far this month alone, the Division has announced charges in four new investigations. These new investigations relate to anticompetitive conduct in multiple industries taking place in various jurisdictions across the country, including the commercial construction industry in Chicago and New England and various federal programs.

Needless to say, our prosecutors are busy and there's no sign that collusion is on the decline. Cartelists are out there, and it's as important as ever that all of detection tools available to our prosecutors are functioning optimally. Though our cases are generated in a number of ways, for the last twenty five years, leniency applications have been an important tool in our arsenal for detecting, preventing, and prosecuting cartels. Today's roundtable will assist our continuing examination of ACPERA's role in ensuring the Leniency Program's continuing success.

The late Justice Scalia has been quoted numerous times for observing that collusion is the “supreme evil of antitrust.”⁴ I could not agree more—prosecuting cartels remains our highest priority. I have explained that antitrust violations such as price-fixing, bid rigging, and market allocation unambiguously disrupt the integrity of the competitive process, harm consumers, and reduce faith in the free market system. Our Leniency Program is designed to facilitate and incentivize self-reporting of collusive behavior. Self-disclosure benefits the first-cartelist to report, and cooperation from leniency applicants furthers our investigations and helps remove

⁴ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

cartels from the free market. ACPERA should encourage such behavior just as Congress contemplated in 2004.

We are here today to discuss the benefits of ACPERA; whether it is incentivizing self-reporting of cartel activity; and what, if anything, in ACPERA's current framework can be improved. The Division would like to learn from those with experience litigating and studying ACPERA in order to better understand how ACPERA is working to uncover anticompetitive behavior and compensate victims of collusion.

I would like to thank in advance all of the Roundtable's participants, particularly the U.S. Chamber of Commerce, the Honorable Judge Ginsburg and the Global Antitrust Institute, the American Bar Association, and the Business Industry Advisory Committee to the OECD for sharing their views on this important topic. I am also grateful to and very interested to hear views from our experienced individual panelists, including those who represent the many victims, on how ACPERA is operating today.

Now, I will invite our Deputy Assistant Attorney General for Criminal Enforcement, Richard Powers, to provide some brief remarks.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

APPLE INC. *v.* PEPPER ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 17–204. Argued November 26, 2018—Decided May 13, 2019

Apple Inc. sells iPhone applications, or apps, directly to iPhone owners through its App Store—the only place where iPhone owners may lawfully buy apps. Most of those apps are created by independent developers under contracts with Apple. Apple charges the developers a \$99 annual membership fee, allows them to set the retail price of the apps, and charges a 30% commission on every app sale. Respondents, four iPhone owners, sued Apple, alleging that the company has unlawfully monopolized the aftermarket for iPhone apps. Apple moved to dismiss, arguing that the iPhone owners could not sue because they were not direct purchasers from Apple under *Illinois Brick Co. v. Illinois*, 431 U. S. 720. The District Court agreed, but the Ninth Circuit reversed, concluding that the iPhone owners were direct purchasers because they purchased apps directly from Apple.

Held: Under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. Pp. 4–14.

(a) This straightforward conclusion follows from the text of the antitrust laws and from this Court’s precedent. Section 4 of the Clayton Act provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue.” 15 U. S. C. §15(a). That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying §4, this Court has consistently stated that “the immediate buyers from the alleged antitrust violators” may maintain a suit against the antitrust violators, *Kansas v. UtiliCorp United Inc.*, 497 U. S. 199, 207, but has ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Unlike the consumer in *Illinois Brick*, the iPhone owners here are not consumers at the bot-

Syllabus

tom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. The absence of an intermediary in the distribution chain between Apple and the consumer is dispositive. Pp. 4–7.

(b) Apple argues that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not the party sells the good or service directly to the complaining party. But that theory suffers from three main problems. First, it contradicts statutory text and precedent by requiring the Court to rewrite the rationale of *Illinois Brick* and to gut its longstanding bright-line rule. Any ambiguity in *Illinois Brick* should be resolved in the direction of the statutory text, which states that “any person” injured by an antitrust violation may sue to recover damages. Second, Apple’s theory is not persuasive economically or legally. It would draw an arbitrary and unprincipled line among retailers based on their financial arrangements with their manufacturers or suppliers. And it would permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Third, Apple’s theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement. Pp. 7–11.

(c) Contrary to Apple’s argument, the three *Illinois Brick* rationales for adopting the direct-purchaser rule cut strongly in respondents’ favor. First, Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective antitrust enforcement. But that makes little sense, and it would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. But *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Third, Apple claims that allowing consumers to sue will result in “conflicting claims to a common fund—the amount of the alleged overcharge.” *Illinois Brick*, 431 U. S., at 737. But this is not a case where multiple parties at different levels of a distribution chain are trying to recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain, cf. *id.*, at 726–727. Pp. 11–14.

846 F. 3d 313, affirmed.

Syllabus

KAVANAUGH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–204

APPLE INC., PETITIONER *v.* ROBERT PEPPER, ET AL.ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 13, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those “apps” enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. “There’s an app for that” has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not “direct purchasers” from Apple under our decision in *Illinois Brick Co. v. Illinois*, 431 U. S. 720,

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745–746 (1977). We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs’ antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the *Illinois Brick* direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a \$99 annual membership fee. Apple requires that the retail sales price end in \$0.99, but otherwise allows the app developers to set the retail price. Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized “the iPhone apps aftermarket.” App. to Pet. for Cert. 53a. The plaintiffs allege that, via the App Store, Apple locks iPhone owners “into buying apps only from Apple and paying Apple’s 30%

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fee, even if” the iPhone owners wish “to buy apps elsewhere or pay less.” *Id.*, at 45a. According to the complaint, that 30 percent commission is “pure profit” for Apple and, in a competitive environment with other retailers, “Apple would be under considerable pressure to substantially lower its 30% profit margin.” *Id.*, at 54a–55a. The plaintiffs allege that in a competitive market, they would be able to “choose between Apple’s high-priced App Store and less costly alternatives.” *Id.*, at 55a. And they allege that they have “paid more for their iPhone apps than they would have paid in a competitive market.” *Id.*, at 53a.

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In *Illinois Brick*, this Court held that direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers’ purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, *Illinois Brick* means that a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain. See *In re Apple iPhone Antitrust Litig.*, 846 F. 3d 313, 323 (2017). Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive prices. *Id.*, at 324. We granted certiorari. 585 U. S. ____ (2018).

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II

A

The plaintiffs’ allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple’s App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were “direct purchasers” from Apple. *Illinois Brick*, 431 U. S., at 745–746. It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: Section 2 of the Sherman Act makes it unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.” 26 Stat. 209, 15 U. S. C. §2. Section 4 of the Clayton Act in turn provides that “*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 38

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Stat. 731, 15 U. S. C. §15(a) (emphasis added). The broad text of §4—“any person” who has been “injured” by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: Applying §4, we have consistently stated that “the immediate buyers from the alleged antitrust violators” may maintain a suit against the antitrust violators. *Kansas v. UtiliCorp United Inc.*, 497 U. S. 199, 207 (1990); see also *Illinois Brick*, 431 U. S., at 745–746. At the same time, incorporating principles of proximate cause into §4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers. *Id.*, at 746.¹

The facts of *Illinois Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the

¹*Illinois Brick* held that the direct-purchaser requirement applies to claims for damages. *Illinois Brick* did not address injunctive relief, and we likewise do not address injunctive relief in this case.

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ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick. *Ibid.*

The bright-line rule of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are “the immediate buyers from the alleged antitrust violators”—may sue. *UtiliCorp*, 497 U. S., at 207.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F. 3d 469, 481–482 (CA7 2002) (Wood, J.).²

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the

²Thirty States and the District of Columbia filed an *amicus* brief supporting the plaintiffs, and they argue that C should be able to sue A in that hypothetical. They ask us to overrule *Illinois Brick* to allow such suits. In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.

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iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple’s theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple.

We see three main problems with Apple’s “who sets the price” theory.

First, Apple’s theory contradicts statutory text and precedent. As we explained above, the text of §4 broadly affords injured parties a right to sue under the antitrust laws. And our precedent in *Illinois Brick* established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. *Illinois Brick*, as we read the opinion, was not based on an economic theory about who set the price. Rather, *Illinois Brick* sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The *Illinois Brick* bright-line rule is grounded on the “belief that simplified administration improves antitrust enforcement.” 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, *Antitrust Law* ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple’s theory would require us

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to rewrite the rationale of *Illinois Brick* and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple’s proposed rule is not persuasive economically or legally. Apple’s effort to transform *Illinois Brick* from a direct-purchaser rule to a “who sets the price” rule would draw an arbitrary and unprincipled line among retailers based on retailers’ financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay \$6 to the manufacturer and then sell the product for \$10, keeping \$4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for \$10 and keep 40 percent of the sales price; and then sell the product for \$10, send \$6 back to the manufacturer, and keep \$4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple’s proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple’s rule a consumer

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could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple’s line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer’s unlawful monopolistic conduct. As the Court of Appeals aptly stated, “the distinction between a markup and a commission is immaterial.” 846 F. 3d, at 324. A leading antitrust treatise likewise states: “Denying standing because ‘title’ never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers.” 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer’s conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff’s damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay

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the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for the supplier without purchasing it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even

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in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent.

In sum, Apple’s theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a “who sets the price” rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* “apply with equal force” in every individual case. 497 U. S., at 216. We should not engage in “an unwarranted and counterproductive exercise to litigate a series of exceptions.” *Id.*, at 217.

But even if we engage with this argument, we conclude that the three *Illinois Brick* rationales—whether considered individually or together—cut strongly in the plaintiffs’ favor here, not Apple’s.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of

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the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. *Illinois Brick* surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in “conflicting claims to a common fund—the amount of the alleged overcharge.” *Illinois Brick*, 431 U. S., at 737. Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain. Cf. *id.*, at 726–727; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481, 483–484

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(1968). If the iPhone owners prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to “trace the effect of the overcharge through each step in the distribution chain.” 431 U. S., at 741.

It is true that Apple’s alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the “mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another.” 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer’s unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a “common fund,” as that term was used in *Illinois Brick*. The consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit.

In short, the three *Illinois Brick* rationales do not per-

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suade us to remake *Illinois Brick* and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law.

* * *

Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, “protecting consumers from monopoly prices” has been “the central concern of antitrust.” 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple’s allegedly monopolistic conduct. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 17–204

APPLE INC., PETITIONER *v.* ROBERT PEPPER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 13, 2019]

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

More than 40 years ago, in *Illinois Brick Co. v. Illinois*, 431 U. S. 720 (1977), this Court held that an antitrust plaintiff can’t sue a defendant for overcharging *someone else* who might (or might not) have passed on all (or some) of the overcharge to him. *Illinois Brick* held that these convoluted “pass on” theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed. It does so by recasting *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That’s not how antitrust law is supposed to work, and it’s an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

I

To understand *Illinois Brick*, it helps to start with the case that paved the way for that decision: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968). Hanover sued United, a company that supplied machinery

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Hanover used to make shoes. Hanover alleged that United’s illegal monopoly in the shoe-making-machinery market had allowed it to charge supracompetitive prices. As damages, Hanover sought to recover the amount it had overpaid United for machinery. United replied that Hanover hadn’t been damaged at all because, United asserted, Hanover had not absorbed the supposedly “illegal overcharge” but had “passed the cost on to its customers” by raising the prices it charged for shoes. *Id.*, at 487–488, and n. 6. This Court called United’s argument a “‘passing-on’ defense” because it suggested that a court should consider whether an antitrust plaintiff had “passed on” the defendant’s overcharge to its own customers when assessing if and to what degree the plaintiff was injured by the defendant’s anticompetitive conduct. *Id.*, at 488.

This Court rejected that defense. While §4 of the Clayton Act allows private suits for those injured by antitrust violations, we have long interpreted this language against the backdrop of the common law. See, e.g., *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U. S. 519, 529–531 (1983). And under ancient rules of proximate causation, the “‘general tendency of the law, in regard to damages at least, is not to go beyond the first step.’” *Hanover Shoe*, 392 U. S., at 490, n. 8 (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)). In *Hanover Shoe*, the first step was United’s overcharging of Hanover. To proceed beyond that and inquire whether Hanover had passed on the overcharge to its customers, the Court held, would risk the sort of problems traditional principles of proximate cause were designed to avoid. “[N]early insuperable” questions would follow about whether Hanover had the capacity and incentive to pass on to its customers in the shoe-making market United’s alleged monopoly rent from the separate shoe-making-machinery market. 392 U. S., at 493. Resolving those questions would, in turn, necessitate a trial within a

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trial about Hanover’s power and conduct in its own market, with the attendant risk that proceedings would become “long and complicated” and would “involv[e] massive evidence and complicated theories.” *Ibid.*

Illinois Brick was just the other side of the coin. With *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages. The State of Illinois had sued several manufacturers of concrete blocks, alleging that the defendants’ price-fixing conspiracy had enabled them to overcharge building contractors, who in turn had passed on those charges to their customers, including the State. Recognizing that *Hanover Shoe* had already prohibited antitrust violators from using a “pass-on theory” defensively, the Court declined to “permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense.” 431 U. S., at 735. “Permitting the use of pass-on theories under §4,” the Court reasoned, would require determining how much of the manufacturer’s monopoly rent was absorbed by intermediary building contractors and how much they were able and chose to pass on to their customers like the State. *Id.*, at 737. Allowing pass-on theories would, as well, allow “plaintiffs at each level in the distribution chain” to “assert conflicting claims to a common fund,” which would require “massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers.” *Ibid.* Better again, the Court decided, to adhere to traditional rules of proximate causation and allow only the first affected customers—the building contractors—to sue for the monopoly rents they had directly paid.

There is nothing surprising in any of this. Unless Congress provides otherwise, this Court generally reads statu-

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tory causes of action as “limited to plaintiffs whose injuries are proximately caused by violations of the statute.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U. S. 118, 132 (2014). That proximate cause requirement typically bars suits for injuries that are “derivative of misfortunes visited upon a third person by the defendant’s acts.” *Id.*, at 133 (internal quotation marks omitted). So, for example, if a defendant’s false advertising causes harm to one of its competitors, the competitor can sue the false advertiser under the Lanham Act. But if the competitor is unable to pay its rent as a result, the competitor’s landlord can’t sue the false advertiser, because the landlord’s harm derives from the harm to the competitor. *Id.*, at 134; see also, e.g., *Bank of America Corp. v. Miami*, 581 U. S. ___, ___–___ (2017) (slip op., at 10–11); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U. S. 336, 346 (2005); *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258, 268–270 (1992). This Court has long understood *Illinois Brick* as simply applying these traditional proximate cause principles in the antitrust context. See *Associated Gen. Contractors*, 459 U. S., at 532–535, 544–545.¹

II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple’s retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist

¹For this reason, it’s hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante*, at 5, n. 1. Under our normal rule of construction, a plaintiff who’s not proximately harmed by a defendant’s unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U. S. 118, 135 (2014) (although a plaintiff that “cannot quantify its losses with sufficient certainty to recover damages . . . may still be entitled to injunctive relief,” the requirement of proximate causation “must be met in every case”).

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retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: “[I]f Apple tells the developer . . . we’re going to take this 30 percent commission . . . what’s the developer going to do? The developer is going to increase its price to cover Apple’s . . . demanded profit.” App. 143.

Because this is *exactly* the kind of “pass-on theory” *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs’ theory will necessitate a complex inquiry into how Apple’s conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs’ claims present these difficulties even more starkly than did the claims at issue in *Illinois Brick*.

Consider first the question of causation. To determine if Apple’s conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with “‘complicated theories’” about “how the relevant market variables would have behaved had there been no overcharge.” *Illinois Brick*, 431 U. S., at 741–743.

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Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further by Apple's requirement that all app prices end in \$0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly \$0.99. Brief for Respondents 44. And a developer charging \$0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to \$1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all of this when determining what damages, if any, plaintiffs suffered as a result of Apple's allegedly excessive 30% commission.²

Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that

²Plaintiffs haven't argued (and so have forfeited in this Court any argument) that Apple's imposition of the 99-cent rule was *itself* an antitrust violation that injured consumers by raising the price of apps above competitive levels. They didn't mention the 99-cent rule in their complaint in district court or in their briefs to the court of appeals. And, as I've noted, they concede that they are seeking damages "based solely on" the 30% commission. Brief in Opposition 5.

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could have absorbed part of the overcharge,” including both consumers and app developers. *Illinois Brick*, 431 U. S., at 737. If, as plaintiffs contend, Apple’s 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court’s holding that *Illinois Brick* doesn’t govern this situation surely must mean *Hanover Shoe* doesn’t either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they’ll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs’ lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); *Illinois Brick*, 431 U. S., at 739 (explaining that “[t]hese absent potential claimants would seem to fit the classic definition of ‘necessary parties,’ for purposes of compulsory joinder”).³

³The Court denies that allowing both consumers and developers to sue over the same allegedly unlawful commission will “result in ‘conflicting claims to a common fund’” as *Illinois Brick* feared. *Ante*, at 12. But Apple charged only one commission on each sale. So even assuming for argument’s sake that the 30% commission was entirely illegal, Apple can only be required to pay out in damages, at most, the full amount it received in commissions. To their credit, even plaintiffs have conceded as much, acknowledging that because “there is only *one 30% markup*,” any claim by the developers against Apple would necessarily be seeking “a piece of the same 30% pie.” Brief in Opposition 12. It’s a mystery why the Court refuses to accept that sensible concession.

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III

The United States and its antitrust regulators agree with all of this, so how does the Court reach such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. *Ante*, at 6. And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal

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rule. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U. S. 752, 763, 772–774 (1984) (rejecting an “artificial distinction” that “serves no valid antitrust goals but merely deprives consumers and producers of the benefits” of a particular business model).

Nor does *Illinois Brick* come close to endorsing such a blind formalism. Yes, as the Court notes, the plaintiff in *Illinois Brick* did contract directly with an intermediary rather than with the putative antitrust violator. But *Illinois Brick*’s rejection of pass-on claims, and its explanation of the difficulties those claims present, had nothing to do with privity of contract. Instead and as we have seen, its rule and reasoning grew from the “general tendency of the law . . . not to go beyond” the party that first felt the sting of the alleged overcharge, and from the complications that can arise when courts attempt to discern whether and to what degree damages were passed on to others. *Supra*, at 2–3. The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter. We do not usually read our own precedents so uncharitably.

Maybe the Court proceeds as it does today because it just disagrees with *Illinois Brick*. After all, the Court not only displaces a sensible rule in favor of a senseless one; it also proceeds to question each of *Illinois Brick*’s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue. *Ante*, at 11–13. The Court even tells us that any “ambiguity” about the permissibility of pass-on damages should be resolved “in the direction of the statutory text,” *ante*, at 8—ignoring that *Illinois Brick* followed the well-trodden path of construing the statutory text in light of background common law principles of proximate cause. Last but not least, the Court suggests that the

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traditional understanding of *Illinois Brick* leads to “arbitrary and unprincipled” results. *Ante*, at 8. It asks us to consider two hypothetical scenarios that, it says, prove the point. The first is a “markup” scenario in which a monopolistic retailer buys a product from a manufacturer for \$6 and then decides to sell the product to a consumer for \$10, applying a supracompetitive \$4 markup. The second is a “commission” scenario in which a manufacturer directs a monopolistic retailer to sell the manufacturer’s product to a consumer for \$10 and the retailer keeps a supracompetitive 40% commission, sending \$6 back to the manufacturer. The two scenarios are economically the same, the Court asserts, and forbidding recovery in the second for lack of proximate cause makes no sense.

But there is nothing arbitrary or unprincipled about *Illinois Brick*’s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, administrable, and far more reasonable than the Court’s artificial rule of contractual privity. Nor do the Court’s hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there’s no doubt that the retailer’s anticompetitive conduct proximately caused the consumer’s injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won’t feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those directly and indirectly harmed means that the consumer can’t establish proximate cause under traditional principles.

Some *amici* share the Court’s skepticism of *Illinois*

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Brick. They even urge us to overrule *Illinois Brick*, assuring us that “modern economic techniques” can now mitigate any problems that arise in allocating damages between those who suffer them directly and those who suffer them indirectly. Brief for State of Texas et al. as *Amici Curiae* 25. Maybe there is something to these arguments; maybe not. But there’s plenty of reason to decline any invitation to take even a small step away from *Illinois Brick* today. The plaintiffs have not asked us to overrule our precedent—in fact, they’ve disavowed any such request. Tr. of Oral Arg. 40. So we lack the benefit of the adversarial process in a complex area involving a 40-year-old precedent and many hard questions. For example, if we are really inclined to overrule *Illinois Brick*, doesn’t that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why not)? Without any invitation or reason to revisit our precedent, and with so many grounds for caution, I would have thought the proper course today would have been to afford *Illinois Brick* full effect, not to begin whittling it away to a bare formalism. I respectfully dissent.

Courtney Bedell Averbach

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Courtney joined Reed Smith in 2014 as an associate in the Global Regulatory Enforcement Group and is a member of the firm's Antitrust & Competition team. Courtney represents litigants in civil antitrust actions, including class actions and large multi-district litigations. Courtney also provides counseling on premerger antitrust issues and regularly prepares Hart-Scott-Rodino filings on behalf of both buy-and sell-side entities.

Courtney also advised corporate clients through the subpoena and civil investigative demand process. In addition to her antitrust practice, Courtney maintains a commercial litigation practice in which she represents clients in complex litigation matters in federal and states courts, as well as arbitral forums. Courtney's extensive litigation experience involves primary drafting of dispositive motions, managing large electronic discovery projects, and taking and defending depositions.

Courtney is dedicated to providing pro bono service to clients in need. As a volunteer for the Allegheny County Name Change Project, Courtney regularly provides pro bono assistance to members of the transgender community seeking a legal name change.

While earning her J.D. at Penn State University, Courtney served as Editor-in-Chief of the *Penn State Law Review*. She also participated in the Civil Rights Appellate Clinic, where she gained appellate experience and worked on a team that filed both a petition for certiorari and an amicus brief with the Supreme Court of the United States.

Publications

- 25 February 2019 "FTC announces revised HSR thresholds for 2019" *Global Regulatory Enforcement Law Blog*; Co-Authors: Christopher R. Brennan, Debra H. Dermody, Michelle A. Mantine, Conor M. Shaffer, William J. Sheridan
- 22 February 2019 "Federal Trade Commission announces adjusted HSR thresholds for 2019" *Reed Smith Client Alert*; Co-Authors: Debra H. Dermody, Michelle A. Mantine, William J. Sheridan, Christopher R. Brennan, Conor M. Shaffer
- 21 January 2019 "Antitrust & Competition Year in Review" Co-Authors: Vaibhav Adlakha, Audrey Augusto, Andrew C. Bernasconi, Bruce A. Blefeld, Daniel I. Booker, Aurore Boyeldieu, Christopher R. Brennan, Lucile Chneiweiss, Debra H. Dermody, Jennifer M. Driscoll, Edward W. Duffy, Karl E. Herrmann, Marjorie C. Holmes, Emma Jones, Corinna Kammerer, Khushbu Kumar, Shourav Lahiri, Marc Lévy, Michael E. Lowenstein, Agathe Mailfait, Michelle A. Mantine, Edward S. Miller, Mao Rong, Edward B. Schwartz, Aurélie Serna, Conor M. Shaffer, Asha R. Sharma, William J. Sheridan, Tilman Siebert, Natasha Tardif, Michaela Westrup, Katherine Yang, Carolyn Chia (Resource Law LLC)
- 23 May 2018 "HSR compliance systems: FTC reminds outside counsel and companies to monitor more than just monetary payment transactions" *Reed Smith Client Alerts*; Co-Authors: Elizabeth Taylor
- 29 January 2018 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2018" *Reed Smith Client Alerts*; Co-Authors: Michelle A. Mantine, William J. Sheridan, Christopher R. Brennan, Conor M. Shaffer
- 16 March 2017 "Lawsuit Highlights Antitrust Exposure Related to Hiring and Compensation" *Reed Smith Client Alerts*; Co-Authors: James A. Holt, Michelle A. Mantine

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Global Regulatory Enforcement Law Blog; Co-Authors: Christopher R. Brennan, Conor M. Shaffer, Debra H. Dermody, Michelle A. Mantine, William J. Sheridan
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Volume 118, Penn State Law Review

Speaking Engagements

- 4 June 2019 Antitrust enforcement trends and key developments in 2019, Pittsburgh, Pennsylvania
- 4 April 2017 Antitrust Enforcement in the Trump Administration, Pittsburgh, Pennsylvania

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Outside the antitrust field, Dan has tried or been counsel in an array of corporate governance and commercial matters, and in class actions, arbitrations or lawsuits involving acquisition agreements, tender offers, supply contracts, false advertising, securities fraud, employment discrimination, public finance, consumer banking, health insurance, state insurance regulation and federal research grants.

Dan has been chair of numerous professional programs on antitrust issues and is the author of numerous professional articles on trade regulation law, litigation and law practice.

Representative Matters

- Represented The Pennsylvania State University in various lawsuits arising from the Sandusky scandal
- Represented majority owners of a large, privately held company in "baseball" style proceeding to determine value of a minority owner's interest
- Defended Bayer in monopolization litigation in its Dr. Scholl's product line
- Counsel to major health insurer in multiple arbitrations with a dominant health system provider
- Represented global bank in injunction action brought in Court of Common Pleas of Allegheny County to enjoin Occupy Pittsburgh from continuing to camp on bank property
- Defended Airbus Inc. in federal court in Los Angeles in antitrust litigation filed by a supplier of components for passenger aircraft
- Defended Quaker State Oil Corporation in class action litigation alleging an agreement with competitors to fix the price of Penn grade crude oil
- Trial to verdict for Highmark Inc., health insurer, as plaintiff in an action to enjoin false advertising by a competing health insurer
- Counseled U. S. Steel Corporation, Citadel Communications, Matthews International, PG Publishing, Highmark, Carmeuse, and numerous other corporations in federal antitrust investigations of acquisitions of competitors
- Defended Highmark Inc. in antitrust action by hospital system in Pittsburgh
- Defended Mellon Bank in Pennsylvania Department of Insurance regulatory proceeding
- Counseled public company boards of directors on issues related to governance, audit and executive compensation
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University of Pittsburgh, 1968, B.A.

Court Admissions

U.S. Supreme Court

All State and Federal Courts - District of Columbia

All State and Federal Courts - Pennsylvania

Professional Admissions

District of Columbia

Pennsylvania

- Defended U. S. Steel Corporation in antitrust class actions in Chicago
- Defended multiple banks in RESPA class actions involving reinsurance of mortgage insurance
- Defended bank in force-placed residential insurance class actions
- Defended Parkdale Mills in class action and in leniency process in connection with alleged price fixing of cotton yarn
- Prosecuted claims of textile manufacturer, Parkdale Mills, for damages in antitrust lawsuit against manufacturer of polyester staple
- Defended insurance client in a multi-defendant RICO class action related to provider payments, including complex procedural and sanctions issues, in the E.D. Pa
- Defended an investment bank in a breach of contract and malpractice action for failure to properly advise regarding the tax structure of the sale of a public company
- Represented a bank trustee, in an accounting and surcharge claim for breach of fiduciary duty and secured an order denying surcharge
- Secured injunction to compel the seller of a mutual fund processing business to comply with non-compete covenants in an acquisition agreement

Honors and Awards

- *The Best Lawyers in America* – For more than 20 years, Dan has been named in *The Best Lawyers in America*. He has been named a Pittsburgh "Lawyer of the Year" in separate specialties (2011-2015). Currently, he appears in the categories of Antitrust Law, Bet-the-Company Litigation, Commercial Litigation, Corporate Law and Litigation–Antitrust.
- *Chambers USA* – Dan has been recognized as one of America's leading antitrust lawyers (2003-2019).
- *The US Legal 500* – Dan has been included in the area of Mergers, Acquisitions and Buyouts within Antitrust - Northeast.
- Selected for inclusion in the *Pennsylvania Super Lawyers* list for Antitrust Litigation (2004-2019).

Publications

- 21 January 2019 "Antitrust & Competition Year in Review"
Co-Authors: Vaibhav Adlakha, Audrey Augusto, Courtney Bedell Averbach, Andrew C. Bernasconi, Bruce A. Blefeld, Aurore Boyeldieu, Christopher R. Brennan, Lucile Chneiweiss, Debra H. Dermody, Jennifer M. Driscoll, Edward W. Duffy, Karl E. Herrmann, Marjorie C. Holmes, Emma Jones, Corinna Kammerer, Khushbu Kumar, Shourav Lahiri, Marc Lévy, Michael E. Lowenstein, Agathe Mailfait, Michelle A. Mantine, Edward S. Miller, Mao Rong, Edward B. Schwartz, Aurélie Serna, Conor M. Shaffer, Asha R. Sharma, William J. Sheridan, Tilman Siebert, Natasha Tardif, Michaela Westrup, Katherine Yang, Carolyn Chia (Resource Law LLC)
- 30 August 2013 "American Airlines & US Airways Merger – Opposite positions taken by US and EU competition authorities"
Reed Smith Client Alert; Co-Authors: Edward S. Miller, Marjorie C. Holmes
- 15 April 2013 "CFPB Investigates Captive Mortgage Reinsurance"
Reed Smith Client Alert; Co-Authors: James L. Rockney, John N. Ellison, Timothy P. Law
- 27 March 2013 "Damages Calculation Key to Supreme Court Reversal of Class Certification in Comcast v. Behrend"
Global Regulatory Enforcement Law Blog; Co-Authors: Debra H. Dermody, Michelle A. Mantine, William J. Sheridan
- 22 December 2011 "Government Proposes Merger of OFT and Competition Commission"
Reed Smith Client Alerts; Co-Authors: Marjorie C. Holmes, Edward S. Miller
- 22 December 2011 "Government Proposes Merger of OFT and Competition Commission"
Reed Smith Client Alerts; Co-Authors: Edward S. Miller, Marjorie C. Holmes, Michael T. Scott
- 2 March 2010 "Status of U.S. Shipping Conference Exemption"
Reed Smith Client Alerts; Co-Author: Marjorie C. Holmes
- Fall 2009 "Reed Smith in Antitrust History"
Antitrust Regulator
- Winter 2009 "Make Way For Class Certification 'Trials'"
Antitrust Regulator
- 5 September 2008 "Chinese Competition Law Up and Running"
Reed Smith Client Alerts
- 28 February 2008 "Federal Court Judge Rules Joint-Bidding Private Equity Funds Did Not Violate Antitrust Laws"
Reed Smith Client Alerts; Co-Author: Mark G. Pedretti
- 10 July 2007 "Implications of the Supreme Court Decision Overturning the Ban on Resale Price Maintenance Agreements"
Reed Smith Client Alerts; Co-Authors: Debra H. Dermody, Michael E. Lowenstein
- 14 January 2002 "Employer Salary Information Exchange Held Basis for Antitrust Claim"
Reed Smith Client Alerts; Co-Author: Debra H. Dermody

- 1 March 2000 "Introduction to The Critical Path"
The Critical Path

Speaking Engagements

- 4 June 2019 Antitrust enforcement trends and key developments in 2019, Pittsburgh, Pennsylvania
- 4 April 2017 Antitrust Enforcement in the Trump Administration, Pittsburgh, Pennsylvania
- 5 March 2013 Pennsylvania Bar Institute, Pittsburgh, Pennsylvania
"Antitrust Class Actions: Beyond the Basics – Notes from the Defense Perspective"
- 12 November 2009 Association of Corporate Counsel – Western Pennsylvania Chapter, Pittsburgh, Pennsylvania
"Counseling In An Era Of Increased Antitrust Enforcement And Litigation: What You And Your Client Need To Know"
- 10 September 2009 Antitrust Program, Pittsburgh, Pennsylvania

Professional and Community Affiliations

- Academy of Trial Lawyers of Allegheny County
- American Bar Association – Past Chair of the Antitrust Section Civil Practice and Procedure Committee; Associate Editor, *Antitrust Magazine*
- Allegheny County Bar Association – Past Chairman of the Antitrust and Class Action Committee
- Judicial Council of Pennsylvania
- District of Columbia Bar Association – Vice Chair of the Antitrust Committee
- Pennsylvania Bar Association
- PA Lawyers Fund for Client Security –Chair
- University of Chicago Law School – Member of the Visiting Committee (2008-2015)
- Serves on the boards of directors of the Pittsburgh Parks Conservancy (Chair), Pittsburgh Civic Light Opera (former Chairman and founding Chair of its Academy of Musical Theater and Chair of the CLO Cabaret Theater) and The Committee for Mellon Square (co-chair)
- Served as an officer or director of numerous business and community organizations, including RTI International Metals, Inc., the Allegheny Conference on Community Development (Executive Committee), the Pittsburgh Glass Center, the Greater Pittsburgh Council of the Boy Scouts of America, United Way of Southwestern Pennsylvania, the Community Investment Fund of the Mon Valley Initiative, the Pittsburgh Regional Alliance (Chairman), the Regional Air Service Partnership (Chairman), the Duquesne Club, the HYP-Pittsburgh Club (President), the American Civil Liberties Union, Penn's Southwest Association (President), Océ-USA Holding, Inc., and HERC Development, Inc.
- Served for many years as a member of the Allegheny County Democratic Committee

Christopher R. Brennan

Associate



Pittsburgh

+1 412 288 3399

cbrennan@reedsmith.com

Education

William & Mary School of Law, 2012, J.D., cum laude, *William & Mary Law Review* - Lead Article Editor; Moot Court Team; Honor Council

University of Pittsburgh, 2009, B.S., summa cum laude, Program Honors in Economics

Court Admissions

State Supreme Court - Pennsylvania

Professional Admissions

Pennsylvania

Christopher is a senior associate in Reed Smith's Global Regulatory Enforcement Group and a member of the firm's Antitrust & Competition team. Christopher's practice focuses on international cartel litigation and investigations, financial services litigation, and health care fraud claims, including allegations of False Claims Act and Anti-Kickback Statute violations. Christopher also has experience in advising corporate clients through internal investigations, corporate integrity agreements, civil investigative demands, and regulatory agency subpoenas.

Christopher has considerable experience with managing massive discovery projects that demand the review and production of millions of records. When the demands of "big data" threaten to break budgets or deadlines, Christopher has implemented cutting-edge predictive coding processes to deliver efficient and cost-effective results.

Christopher regularly represents a diverse mix of clients, from multinational manufacturers, medical device providers, pharmaceutical companies, and major financial institutions to individual shareholders of closely-held companies.

When advising clients on antitrust and merger matters, Christopher relies on his dual major in Economics and Business from the University of Pittsburgh, where he graduated first in the program. Christopher received his J.D. from the College of William & Mary School of Law and served as a Lead Article Editor for the Law Review.

Prior to joining Reed Smith, Christopher was a judicial intern for the Honorable F. Bradford Stillman with the U.S. District Court for the Eastern District of Virginia, and for the Honorable John T. Bender with the Pennsylvania Superior Court.

Representative Matters

- Defended financial services client against allegations of fraud and indemnification by private equity plaintiff following plaintiff's acquisition of client's portfolio company.
- Prevailed on behalf of minority shareholder alleging fraud, breach of fiduciary duties, and breach of contract claims based on forced redemption of interests in closely-held corporations.
- Assisted in successful representation of client subject to civil investigative demand in nationwide Anti-Kickback Statute and False Claims Act investigation, which resulted in no action taken by government authorities.
- Advised medical device manufacturer throughout internal investigation arising from whistleblower complaint, including subsequent implementation of corporate integrity agreement.
- Implemented technology-assisted review discovery protocols for clients facing millions of dollars in expenses under traditional, linear review models or under tight deadlines by government regulators.
- Represented foreign and domestic manufacturers accused of allegedly price fixing automotive parts in multidistrict litigation stemming from the largest criminal antitrust investigation in history by the U.S. Department of Justice.

Publications

- 16 May 2019 "Buyers and sellers beware! FTC warning emphasizes antitrust counsel's role in due diligence"
Reed Smith Client Alerts; Co-Author: Michelle A. Mantine
- 25 February 2019 "FTC announces revised HSR thresholds for 2019"
Global Regulatory Enforcement Law Blog; Co-Authors: Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine, Conor M. Shaffer, William J. Sheridan
- 22 February 2019 "Federal Trade Commission announces adjusted HSR thresholds for 2019"
Reed Smith Client Alerts; Co-Authors: Debra H. Dermody, Michelle A. Mantine, William J. Sheridan, Conor M. Shaffer, Courtney Bedell Averbach
- 21 January 2019 "Antitrust & Competition Year in Review" Co-Authors: Vaibhav Adlakha, Audrey Augusto, Courtney Bedell Averbach, Andrew C. Bernasconi, Bruce A. Blefeld, Daniel I. Booker, Aurore Boyeldieu, Lucile Chneiweiss, Debra H. Dermody, Jennifer M. Driscoll, Edward W. Duffy, Karl E. Herrmann, Marjorie C. Holmes, Emma Jones, Corinna Kammerer, Khushbu Kumar, Shourav Lahiri, Marc Lévy, Michael E. Lowenstein, Agathe Mailfait, Michelle A. Mantine, Edward S. Miller, Mao Rong, Edward B. Schwartz, Aurélie Serna, Conor M. Shaffer, Asha R. Sharma, William J. Sheridan, Tilman Siebert, Natasha Tardif, Michaela Westrup, Katherine Yang, Carolyn Chia (Resource Law LLC)
- 29 January 2018 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2018"
Reed Smith Client Alerts; Co-Authors: Michelle A. Mantine, William J. Sheridan, Conor M. Shaffer, Courtney Bedell Averbach
- 12 January 2018 "International Comity? U.S. Jury Will Noodle Disputed Facts of *In re Ramen* Despite Contrary Ruling from Korean Supreme Court"
Reed Smith Client Alerts; Co-Author: Michelle A. Mantine
- December 2017
Predictive Coding - A Robust but Efficient Approach for Responding to Recent Regulatory Scrutiny of Sales Practices
- 19 June 2017 "Seventh Circuit Affirms Dismissal of Hospital Foreclosure Claims with Judge Posner asking, 'what is more common than exclusive dealing?'"
Reed Smith Client Alerts; Co-Authors: Martin J. Bishop, William J. Sheridan, Debra H. Dermody
- 16 May 2017 "DOJ Casts Shade on Proposed Chicago Sun-Times Newspaper Sale"
Global Regulatory Enforcement Law Blog; Co-Author: Michelle A. Mantine
- 27 January 2017 "Antitrust Update: 2017 HSR Thresholds"
Global Regulatory Enforcement Law Blog; Co-Authors: Conor M. Shaffer, Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine, William J. Sheridan
- 23 January 2017 "Individual Investors Pay Civil Penalties for Failing to Report Acquisitions of Voting Securities to the Federal Trade Commission"
Global Regulatory Enforcement Law Blog; Co-Authors: Conor M. Shaffer, Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine, William J. Sheridan
- 20 January 2017 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2017"
Reed Smith Client Alerts; Co-Authors: Conor M. Shaffer, Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine, William J. Sheridan
- 19 January 2017 "U.S. Antitrust Agencies Update International Enforcement Guidelines"
Global Regulatory Enforcement Law Blog; Co-Author: Michelle A. Mantine
- 19 January 2017 "Revised International Enforcement Guidelines Prescribe Increasing Collaboration Between U.S., Foreign Competition Agencies to Investigate, Prosecute Antitrust Violations"
Life Sciences Legal Update; Co-Author: Michelle A. Mantine
- 18 January 2017 "Justice Department and Federal Trade Commission Announce Updated International Antitrust Guidelines"
Reed Smith Client Alerts; Co-Author: Michelle A. Mantine
- 2011 "Katz Cradle: Holding On to Fourth Amendment Parity in an Age of Evolving Electronic Communication"
53 WM. & MARY L. REV. 1797

Speaking Engagements

- 4 June 2019 Antitrust enforcement trends and key developments in 2019, Pittsburgh, Pennsylvania
- 4 April 2017 Antitrust Enforcement in the Trump Administration, Pittsburgh, Pennsylvania

Jennifer M. Driscoll

Counsel



Jennifer is a part of our Antitrust and Competition team in the Global Regulatory Group. She focuses on antitrust investigations, litigation, mergers and counseling. She has represented clients in international cartel investigations, merger investigations and Sherman Act Section Two class action lawsuits in federal courts.

Jennifer has counseled international clients about antitrust laws relating to mergers and acquisitions and represented both corporations and individuals in the Antitrust Division's investigation of the auto parts industry.

Active in the ABA Section of Antitrust Law, Jennifer is a member of the International Cartel Task Force. She was formerly the Vice Chair of the International Committee and Chair of the Section's 2010 Fall Forum. She has spoken on international cartel and unilateral conduct panels and has written articles and papers on those topics.

Prior to joining Reed Smith, Jennifer worked at law firms in New York, Paris and London. She worked on behalf of the first company to lose a grant of amnesty from the US Department of Justice, as well as other high-profile antitrust matters, such as the World Trade Center insurance coverage dispute.

Reflecting her international practice strengths, she studied at the 1999 Summer Institute of International and Comparative Law at the Université de Paris I, Panthéon-Sorbonne.

Honors and Awards

- *Legal 500*, 2012-2015

Publications

- 25 April 2019 "Algorithmic Accountability Act proposed by U.S. lawmakers" *Technology Law Dispatch*; Co-Authors: Vincent James (Jim) Barbuto, Stephanie Wilson, Xiaoyan Zhang
- 24 April 2019 "U.S. lawmakers propose Algorithmic Accountability Act" *Reed Smith Client Alerts*; Co-Authors: Stephanie Wilson, Xiaoyan Zhang, Vincent James (Jim) Barbuto
- 21 March 2019 "In privacy we (anti)trust: Regulators worldwide consider competition law as tool for consumer protection" *Technology Law Dispatch*; Co-Authors: Vincent James (Jim) Barbuto, Gerard M. Stegmaier
- 15 February 2019 "Barr Review: What could President Trump's new AG mean for antitrust?" *Reed Smith Client Alerts*; Co-Authors: Edward B. Schwartz, Karl E. Herrmann
- 21 January 2019 "Antitrust & Competition Year in Review" Co-Authors: Vaibhav Adlakha, Audrey Augusto, Courtney Bedell Averbach, Andrew C. Bernasconi, Bruce A. Blefeld, Daniel I. Booker, Aurore Boyeldieu, Christopher R. Brennan, Lucile Chneiweiss, Debra H. Dermody, Edward W. Duffy, Karl E. Herrmann, Marjorie C. Holmes, Emma Jones, Corinna Kammerer, Khushbu Kumar, Shourav Lahiri, Marc Lévy, Michael E. Lowenstein, Agathe Mailfait, Michelle A. Mantine, Edward S. Miller, Mao Rong, Edward B. Schwartz, Aurélie Serna, Conor M. Shaffer, Asha R. Sharma, William J. Sheridan, Tilman Siebert, Natasha Tardif, Michaela Westrup, Katherine Yang, Carolyn Chia (Resource Law LLC)

Washington, D.C.

+1 202 414 9269

jdriscoll@reedsmith.com

Education

University of Pennsylvania Law School,
2000, J.D.

Cornell University, 1996, M.P.A.

Cornell University, 1993, B.S.

Court Admissions

U.S. Court of Appeals - Third Circuit

U.S. District Court - Eastern District of New York

U.S. District Court - Southern District of New York

Professional Admissions

District of Columbia

New York

- 12 December 2018 "FTC hearings address AI regulatory challenges"
Global Regulatory Enforcement Law Blog; Co-Author: Karl E. Herrmann
- 12 December 2018 "Rise of AI poses new regulatory challenges"
Technology Law Dispatch; Co-Authors: John P. Feldman, Karl E. Herrmann, Gerard M. Stegmaier
- 12 December 2018 "Algorithms, AI and antitrust: the next frontier of regulatory challenges"
Reed Smith Client Alerts; Co-Author: Karl E. Herrmann
- 9 November 2018 "Trump Administration International Pricing Index Plan for Medicare Part B Drugs Poses Huge Implications for Industry and Raises Numerous Questions"
Reed Smith Client Alerts; Co-Authors: Joseph W. Metro, Robert J. Hill, Edward B. Schwartz, Paul W. Pitts

Speaking Engagements

- 4 June 2019 Antitrust enforcement trends and key developments in 2019, Pittsburgh, Pennsylvania
- 3 April 2019 Personal Data Risks Rewards and Compliance (Los Angeles), Los Angeles, California
- 2 April 2019 Personal Data: Risks, Rewards, and Compliance (San Francisco), San Francisco, California
- 20 February 2019 International Drug Pricing Index Proposal: Commercial, regulatory and competitive perspectives

Professional and Community Affiliations

- Member, ABA Section of Antitrust Law - International Cartel Task Force
- Women's White Collar Defense Association

William J. Sheridan

Partner



Will is a partner in the firm's Global Regulatory Enforcement Group. His practice focuses on antitrust matters, including civil antitrust litigation, government antitrust investigations, and Hart-Scott-Rodino counseling.

Will has litigated numerous healthcare matters on issues ranging from reimbursement to ERISA to antitrust. He has briefed and argued dispositive motions in state and federal courts, taken and defended depositions, and examined witnesses at trial. Will is a former law clerk to then-Chief Judge Gary L. Lancaster of the U.S. District Court for the Western District of Pennsylvania.

Representative Matters

- Bristow Endeavor Healthcare, LLC v. Blue Cross and Blue Shield Association, Health Care Service Corporation, et al., No. 16-5149 (10th Cir. May 31, 2017) Represented managed care defendants in obtaining dismissal of antitrust conspiracy and monopolization claims.
- Acuity Optical Laboratories, LLC v. Davis Vision, Inc., No. 14-cv-3231 (CD. Ill. 2016) Represented managed vision care company in defending numerous antitrust claims.
- Obtained \$20 plus million arbitration award for managed care plaintiff in breach of contract dispute related to medical coding and billing.
- Represented managed care defendant in Department of Justice, Antitrust Division investigation regarding purported payor-provider conspiracy.
- Secured injunction to require seller of six-hospital system to comply with acquisition agreement with health insurer/ buyer.
- Represented PNC and its Board of Directors in successful defense of shareholder derivative litigation related to, among other things, the acquisition of National City Bank.
- Bragg and Hatfield v. Aracoma Coal, et al. - Received settlement in a contingent fee case brought against Massey Energy Company, CEO Don Blankenship, and two subsidiaries, on behalf of two women widowed by a coal mine fire that occurred in January 2006.

Publications

- 25 February 2019 "FTC announces revised HSR thresholds for 2019" *Global Regulatory Enforcement Law Blog*; Co-Authors: Courtney Bedell Averbach, Christopher R. Brennan, Debra H. Dermody, Michelle A. Mantine, Conor M. Shaffer
- 22 February 2019 "Federal Trade Commission announces adjusted HSR thresholds for 2019" *Reed Smith Client Alert*; Co-Authors: Debra H. Dermody, Michelle A. Mantine, Christopher R. Brennan, Conor M. Shaffer, Courtney Bedell Averbach
- 21 January 2019 "Antitrust & Competition Year in Review" Co-Authors: Vaibhav Adlakha, Audrey Augusto, Courtney Bedell Averbach, Andrew C. Bernasconi, Bruce A. Blefeld, Daniel I. Booker, Aurore Boyeldieu, Christopher R. Brennan, Lucile Chneiweiss, Debra H. Dermody, Jennifer M. Driscoll, Edward W. Duffy, Karl E. Herrmann, Marjorie C. Holmes, Emma Jones, Corinna Kammerer, Khushbu Kumar, Shourav Lahiri, Marc Lévy, Michael E. Lowenstein, Agathe Mailfait, Michelle A. Mantine, Edward S. Miller, Mao Rong, Edward B. Schwartz, Aurélie Serna, Conor M. Shaffer, Asha R. Sharma, Tilman Siebert, Natasha Tardif, Michaela Westrup, Katherine Yang, Carolyn Chia (Resource Law LLC)
- 29 January 2018 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2018" *Reed Smith Client Alerts*; Co-Authors: Michelle A. Mantine, Christopher R. Brennan, Conor M. Shaffer, Courtney Bedell Averbach

Pittsburgh

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wsheridan@reedsmith.com

Education

Northwestern Pritzker School of Law,
2007, J.D., cum laude, Associate Editor,
Northwestern University Law Review

Georgetown University, 2004, A.B.

Court Admissions

U.S. Court of Appeals - Tenth Circuit

U.S. District Court - Western District of
Pennsylvania

U.S. District Court - Central District of
Illinois

U.S. Court of Appeals - Third Circuit

Professional Admissions

Pennsylvania

- 19 June 2017 "Seventh Circuit Affirms Dismissal of Hospital Foreclosure Claims with Judge Posner asking, "what is more common than exclusive dealing?"
Reed Smith Client Alerts; Co-Authors: Martin J. Bishop, Debra H. Dermody, Christopher R. Brennan
- 2 March 2017 "Independent Health Care Providers Beware – FTC Actions Against Group Contracting Efforts Continue"
Global Regulatory Enforcement Law Blog; Co-Authors: Conor M. Shaffer, Michelle A. Mantine
- 1 March 2017 "FTC Action Against Physician Cooperative Illustrates Risks of Collective Contracting Activity Among Independent Providers"
Reed Smith Client Alerts; Co-Authors: Conor M. Shaffer, Michelle A. Mantine
- 2 February 2017 "Duke Energy Forced to Pay Large Fine in HSR Gun Jumping Settlement"
Global Regulatory Enforcement Law Blog; Co-Authors: Bruce A. Blefeld, Edward W. Duffy, Michelle A. Mantine
- 27 January 2017 "Antitrust Update: 2017 HSR Thresholds"
Global Regulatory Enforcement Law Blog; Co-Authors: Christopher R. Brennan, Conor M. Shaffer, Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine
- 24 January 2017 "Recent HSR Gun Jumping Settlement in Excess of Half a Million Dollars: Why it's Worth the Wait"
Reed Smith Client Alerts; Co-Authors: Bruce A. Blefeld, Edward W. Duffy, Michelle A. Mantine
- 23 January 2017 "Individual Investors Pay Civil Penalties for Failing to Report Acquisitions of Voting Securities to the Federal Trade Commission"
Global Regulatory Enforcement Law Blog; Co-Authors: Christopher R. Brennan, Conor M. Shaffer, Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine
- 20 January 2017 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2017"
Reed Smith Client Alerts; Co-Authors: Christopher R. Brennan, Conor M. Shaffer, Courtney Bedell Averbach, Debra H. Dermody, Michelle A. Mantine
- 11 October 2016 "A Superficial Analysis of Competitive Foreclosure Won't Play in Peoria"
Reed Smith Client Alerts; Co-Authors: Debra H. Dermody, Martin J. Bishop
- 1 July 2016 "Federal Trade Commission Announces Increased Fines"
Reed Smith Client Alerts; Co-Authors: Conor M. Shaffer, Debra H. Dermody, Michelle A. Mantine
- 25 January 2016 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2016"
Reed Smith Client Alerts; Co-Authors: Debra H. Dermody, Michelle A. Mantine
- 16 January 2015 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2015"
Reed Smith Client Alerts; Co-Authors: Debra H. Dermody, Michelle A. Mantine
- 16 January 2015 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2015"
Global Regulatory Enforcement Law Blog; Co-Authors: Debra H. Dermody, Michelle A. Mantine
- June 2014 "Motorola Mobility LLC v. AU Optronics Corp.: Seventh Circuit Limits Foreign Reach of U.S. Antitrust Laws"
The Antitrust Counselor; Co-Authors: Conor M. Shaffer, Michelle A. Mantine
- 21 January 2014 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2014"
Reed Smith Client Alert; Co-Authors: Debra H. Dermody, Michelle A. Mantine
- 25 June 2013 "Supreme Court Subjects Reverse Payment Settlements to Antitrust Review"
Reed Smith Client Alert; Co-Author: Jessica R. Rose
- 25 June 2013 "Supreme Court Remands Pay-for-Delay Settlement for Antitrust Review in FTC v. Actavis"
Global Regulatory Enforcement Law Blog; Co-Author: Jessica R. Rose
- 27 March 2013 "Damages Calculation Key to Supreme Court Reversal of Class Certification in Comcast v. Behrend"
Global Regulatory Enforcement Law Blog; Co-Authors: Daniel I. Booker, Debra H. Dermody, Michelle A. Mantine
- 20 March 2013 "Pennsylvania Considering New Comprehensive Antitrust Law"
Global Regulatory Enforcement Law Blog; Co-Authors: Jessica R. Rose, Michelle A. Mantine
- 20 February 2013 "Supreme Court Reins in State-Action Immunity Doctrine"
Global Regulatory Enforcement Law Blog
- 14 January 2013 "Federal Trade Commission Announces Adjusted HSR Thresholds for 2013"
Global Regulatory Enforcement Law Blog; Co-Authors: Debra H. Dermody, Michelle A. Mantine

Speaking Engagements

- 4 June 2019 Antitrust enforcement trends and key developments in 2019, Pittsburgh, Pennsylvania
- 4 April 2017 Antitrust Enforcement in the Trump Administration, Pittsburgh, Pennsylvania
- 7 June 2016 Western Pennsylvania Chapter of the Association of Corporate Counsel, Pittsburgh, Pennsylvania
- 9 July 2013 Reed Smith's Breakfast Seminar on "Joint Ventures, JOAs and AMIs", Canonsburg, Pennsylvania