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By Elyssa Wenzel | Clifford Chance

Edited by Justin Stewart-Teitelbaum & Angela Landry

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I. INTRODUCTION

What's in a name? According to the US antitrust agencies, a conglomerate merger by any other name (be it "range effects," "portfolio effects," "ecosystem effects," or "entrenchment") could be just as anticompetitive. The US Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (together, the "Agencies") have settled on "entrenchment" as the new term for an old theory of harm that had been long disregarded by both US courts and the Agencies themselves. Indeed, the Agencies prominently featured entrenchment theory in the draft Merger Guidelines issued for public comment on July 19, 2023.[2] Prior to the release of the new Merger Guidelines, the FTC previewed entrenchment as a theory of harm in its challenge to Amgen, Inc.'s ("Amgen") proposed acquisition of Horizon Therapeutics PLC ("Horizon"),[3] a novel and audacious action that surprised many in the antitrust community. On September 1, 2023, the FTC announced a proposed 15-year behavioral consent order with Amgen and Horizon.[4] None doubt that the enforcers will frame this settlement as a win; not just for the matter at hand but for a revived focus on conglomerate effects, a theory of harm that had been out of favor since the 1970s. Had this matter proceeded to trial, many wonder, what were the chances that the FTC could have won? Does conglomerate effects theory have the support necessary for a permanent revival?

To answer that question, this article will assess the treatment of conglomerate effects theory in both the United States and Europe, due to the European Commission's ("EC") outsized influence on the global progressive antitrust movement. This article will also examine how conglomerate effects, via *Amgen/Horizon* and the new Merger Guidelines, will be received in the courts in future cases. Entrenchment theory is certainly gaining traction on both sides of the pond. However, we predict the FTC's future efforts in reviving conglomerate effects at trial will likely fall flat if they rely on *FTC v. Procter & Gamble Co.*, avoided for decades by US courts, as a lodestar of conglomerate effects theory.[5] Indeed, seemingly in response to the Defendants' scathing memorandum in opposition of the preliminary injunction (and perhaps the legal community's growing skepticism of the theory of harm),[6] the FTC withdrew its administrative complaint the very next day (August 23, 2023)[7] and settled the following week.[8] Even though the FTC has settled, *Amgen/Horizon* is certainly a harbinger of what to expect in the near term and likely the first of many cases that both Agencies will bring to champion entrenchment theory in US merger review.

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[1] Elyssa Wenzel is a senior associate in the Antitrust practice of Clifford Chance LLP. She is based in Washington, D.C. William Lavery, Partner, Clifford Chance, supervised and Makenzie Stuard, J.D. Candidate at the University of Texas School of Law, provided research assistance.

[2] U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES ("Merger Guidelines"), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[3] Amended Preliminary Injunction Complaint in FTC v. Amgen, Inc., No. 23-CV-3053 (N.D. Ill.) (filed June 22, 2023) ("Preliminary Injunction Complaint") [hereinafter *Amgen/Horizon*].

[4] Press Release, Fed. Trade Comm'n, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition, (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition.

[5] FTC v. Procter & Gamble, 386 U.S. 568 (1967).

[6] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction in *Amgen/Horizon* (filed August 22, 2023).

[7] Order Withdrawing Matter from Adjudication in *In re Amgen, Inc. and Horizon Therapeutics plc*, Docket No. 9414 (filed August 23, 2023).

[8] Pulling the matter from administrative adjudication, however, does not affect the remaining six state plaintiffs in federal court adjudication.

II. CASE BACKGROUND

Amgen/Horizon was the first challenge under an entrenchment theory of harm in decades. Amgen is a global biotechnology company with a portfolio of 27 pharmaceutical drugs, nine of which are considered blockbuster drugs (Enbrel, Prolia, and Otezla, among others, generated sales in excess of $1 billion in 2022). In December 2022, Amgen entered an agreement to acquire Horizon, another biotechnology firm with two leading marketed drugs – Tepezza, which treats thyroid eye disease (and generated almost $2 billion in 2022 sales) and Krystexxa, which treats chronic refractory gout (and brought in $716 million in 2022) – for approximately $28 billion. After a second phase investigation, the FTC filed a complaint for preliminary injunction in the Northern District of Illinois on May 16, 2023, and its administrative complaint on June 22, 2023. The FTC was later joined by state attorneys general in California, Illinois, Minnesota, New York, Washington, and Wisconsin. The parties agreed to stay the Part 3 trial until after the preliminary injunction hearing. As of the date of this article's publication, the parties settled the administrative complaint, and it is expected that the FTC will withdraw the federal complaint. It is unlikely that the states will forge ahead without the FTC's backing.

The *Amgen/Horizon* complaint rested on the alleged ability and incentive for Amgen to leverage their portfolio of must-have blockbuster drugs to extend, or entrench, the monopoly position of Horizon's products in pharmaceutical benefit managers' ("PBM") formularies. The FTC alleged that Amgen will seek to keep generic competitors out by bundling their portfolio products together and granting excessive rebates, which would raise barriers to entry, raise costs for competitors, and entrench a monopolistic formulary position. To be sure, the government admitted that Tepezza and Krystexxa are patent-protected monopolies—and there are no competing products likely to be on the market anytime soon.[9] However, the FTC relied on allegations not yet proven in *Regeneron v. Amgen*,[10] a private lawsuit that recently survived a motion to dismiss, to allege that Amgen has engaged in anticompetitive bundling in the past and posit that Amgen will inevitably do so in the future with Horizon's products. The Answers and counterclaims that the Respondents lobbed back were telling, including the assertion that the cross-market bundling theory "has no legal or factual support" and that the FTC did not bring a single piece of evidence to prove their allegation.[11] Further, the Respondents offered a behavioral "fix-it-first" – an agreement not to bundle Tepezza and Krystexxa with its other products in PBM negotiations[12] – that the FTC flatly rejected in its opening brief (without much explanation) as easily undone by "handshake" agreements.[13] This is substantially the same agreement that FTC entered with the parties to settle the merger challenge.[14]

III. US LEGAL PRECEDENT – *PROCTER & GAMBLE* RESURRECTED?

The FTC's use of entrenchment theory in *Amgen/Horizon* surprisingly relied heavily on *FTC v. Procter & Gamble*,[15] a Supreme Court case from 1967. In *Procter & Gamble,* the Court upheld the FTC's challenge to Procter & Gamble's acquisition of Clorox, which they called a "product-extension merger."[16] The

[9] Preliminary Injunction Complaint ¶¶ 1, 7–8.

[10] Complaint, Regeneron Pharmaceuticals, Inc. v. Amgen, Inc., 1:22-cv-00697 (D. Del.) (filed May 27, 2022).

[11] Answer, Affirmative Defenses and Counterclaims of Defendants, *Amgen/Horizon* at 3, 8 (filed June 29, 2023) (herein "Preliminary Injunction Answer").

[12] Preliminary Injunction Answer, *Amgen/Horizon* at 3 ("Amgen also made clear that it would be willing to formalize that commitment in a binding consent offer.").

[13] Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction, *Amgen/Horizon* (filed July 14, 2023) ("Amgen could circumvent an outward commitment not to bundle its products with Horizon's by entering into 'handshake' agreements with PBMs/GPOs, or by simultaneously negotiating separate contracts for its products and Horizon's but offering implicit rebates on [redacted] in exchange for a favorable formulary position.").

[14] *See* Press Release, Fed. Trade Comm'n, *supra* note 4.

[15] 386 U.S. 568, 570 (1967).

[16] *Id.* at 570.

Court articulated that while the parties' products did not overlap (Procter & Gamble made packaged detergents while Clorox made liquid bleach), the acquisition was likely to raise entry barriers due to marketing and volume discounts and would have the effect of dissuading liquid bleach competitors from entering the market.[17] Justice Harlan's concurrence chastised the FTC's "overstated and over-simplified" assessment of advertising economies, protesting that conglomerate theory was "too new" and warranted more exactitude from the Court.[18] Although he arrived at the same conclusion as the majority, Justice Harlan wanted to see more from the Court's reasoning than an assumption of illegality for a conglomerate merger based on horizontal merger market share presumptions. *Procter & Gamble* has since been distinguished on other grounds and cited not for conglomerate effects theory but rather support for potential competition theory.[19] *Procter & Gamble*'s holding on conglomerate effects, therefore, has not been overturned and is arguably still good law.

Conglomerate merger challenges in the United States, though common in the 1960s and 1970s, were later abandoned in favor of the Chicago School view that such mergers were procompetitive. For the past 40 years, conglomerates were perceived to bring lower prices to consumers via economies of scale in manufacturing, advertising, and distribution, among other processes. The Agencies, as recently as 2020 in an official joint statement to the Organisation for Economic Co-operating and Development's Competition Committee, re-emphasized the Agencies' abandonment of the *Procter & Gamble* theory stating that "it would be illogical, then, to prohibit mergers *because* they facilitate efficiency or innovation in production" (emphasis theirs).[20] The 2001 DOJ statement to OECD is even more damning, stating that challenging conglomerate mergers "is at odds with the fundamental objectives of the antitrust laws."[21] Such ardent language would suggest that conglomerate effects theory is a non-starter in modern antitrust practice.

Following *Procter & Gamble*, activities that the Agencies today are attempting to classify as entrenchment came to be viewed as an illness to cure rather than prevent; accordingly, such behaviors typically are addressed through conduct proceedings rather than merger challenges. In September 2022, the FTC filed a complaint in federal court against Syngenta Crop Protection and Corteva, Inc. seeking to bar the companies from using so-called loyalty programs (rebates) to block and restrict generic competition from pesticide markets.[22] Most recently, in July 2023, the FTC filed an amicus brief in *Applied Medical Resources v. Medtronic*, hinting at a similar entrenchment theory of harm for medical products vis a vis exclusive dealing.[23] By illustrating Medtronic as "a dominant supplier of medical devices [that] allegedly impose[d] exclusive-dealing and bundling arrangements that shut out rivals," the FTC previewed language now echoed in the briefing in support of its *Amgen/Horizon* challenge.[24] But whether the antitrust laws allow the Agencies to challenge this type of activity

[17] *Id.* at 578.

[18] *Id.* at 584–603. ("[A]ssumption is no substitute for reasonable probability as a measure of illegality under s 7.").

[19] *See, e.g.,* Matter of Sterling Drug Inc., 80 F.T.C. 477 (Apr. 7, 1972) (citing for potential competition); United States v. First Nat'l State Bancorp., 499 F. Supp. 793, 815 (D.N.J. July 23, 1980); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851 (2d Cir. 1974) (comparing for product extension definition).

[20] U.S. Dep't of Just. Antitrust Div. & Fed. Trade Comm'n, *Conglomerate Effects of Mergers – Note by the United States* (Bkgd. Note for OECD Directorate for Financial and Enterprise Affairs, Competition Comm., June 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf; *see also* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction at 14.

[21] U.S. Dep't of Just. Antitrust Div., *Range Effects: The United States Perspective* 3 (Bkgd. Note for OECD Roundtable of Portfolio Effects in Conglomerate Mergers, Oct. 12, 2001), https://www.justice.gov/sites/default/files/atr/legacy/2015/01/26/9550.pdf ("[T]here is no empirical support for the notion that size alone conveys any significant competitive advantage that is not efficiency related.").

[22] Amended Complaint, FTC v. Syngenta Crop Protection AG, 1:22-cv-00828 (M.D.N.C.) (filed Dec. 23, 2022).

[23] Brief for Fed. Trade Comm'n as Amicus Curiae, Applied Medical Resources Corp. v. Medtronic, Inc., 8:23-cv-00268 (C.D. Cal.) (filed July 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p082105medtronicamicusbrief.pdf (addressing the exclusive sale of surgical "advanced bipolar energy devices" to group purchasing organizations).

[24] *Id.* at 1.

before it even occurs, arguably based on pure speculation and without the benefit of a body of evidence, remains to be seen.

IV. IF THEY BUILD IT, WILL THEY COME? *AMGEN/HORIZON* AS THE BELLWETHER FOR THE NEW MERGER GUIDELINES

The new draft Merger Guidelines crystallize the aggressive approach of the current administration. While not binding on courts, the Agencies' general and sector-specific guidelines provide insight and clarity on agency approaches for the courts, antitrust practitioners, and the public. Merger guidelines tend to be as aspirational as they are practical, identifying areas of concern that have not yet been thoroughly litigated. Certainly, the new Merger Guidelines dramatically broaden the scope of antitrust inquiry to concerns in actual and perceived potential competition, labor markets, multi-sided platforms, and serial acquisitions and deprioritizes safe harbors and efficiencies defenses.

Most notably, the section concerning "entrenchment" in the new Merger Guidelines amplifies the theory of the *Amgen/Horizon* challenge.[25] Guideline 7 states, "[w]hen one merging firm has or is approaching monopoly power, any acquisition that may tend to preserve its dominant position may tend to create a monopoly in violation of Section 7."[26] Entrenchment may incorporate behaviors that range from conglomerate effects to input foreclosure and killer acquisitions. For support, the Agencies stretch back in time to cases from the 1960s and 1970s,[27] in particular *Procter & Gamble*, to support the proposition that a "merger that increases barriers to entry [or] additional entry costs, can entrench a dominant position."[28] Guideline 7 further outlines likely activities that will be viewed as entrenchment; most pertinent to *Amgen/Horizon* and other future cases brought in the pharmaceutical sector is increasing entry barriers to biosimilar competitors by locking up exclusive placement on PBM formularies, thereby eliminating a nascent competitive threat by chilling the incentives for biosimilars to enter the market.

V. EUROPEAN COMMISSION: BEHAVIORAL FIXES ALLEVIATE CONGLOMERATE CONCERNS

The US enforcers are arguably catching up to their more progressive counterparts in Europe who have thus far spearheaded modern-day antitrust causes such as protecting data privacy and targeting Big Tech. While matters before the EC do not have precedential value in the United States, a comprehensive analysis still warrants a brief assessment of conglomerate merger treatment and trends across the pond. The EC has been more active in challenging conglomerate effects in recent years; however, they have not been successful in fully blocking any of the challenged deals. Most of the recent conglomerate effects investigations have been brought alongside traditional horizontal or vertical merger concerns and successfully alleviated by behavioral remedies.

Arguably, the EC has had a more steady and articulate treatment of conglomerate effects in the past two decades and was often at odds with the decisions being made by US enforcers for the same deals.[29] The EC's 2008 Non-Horizontal Guidelines define conglomerate effects as "mergers between companies that are active in closely related markets, for instance suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of

[25] Merger Guidelines at 19 (Guideline 7).

[26] *Id*.

[27] *See, e.g.,* Phila. Nat'l Bank, 374 U.S. 321, 365 n.42 (1963); 386 U.S. 568 (1967); Allis-Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506 (3d Cir. 1969); Fruehauf Corp. v. FTC, 503 F.2d 345 (2d Cir. 1979); Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972).

[28] Merger Guidelines at 20.

[29] For example, General Electric's $45 billion attempted merger of Honeywell was abandoned after the EC's challenge was upheld by the European Court of First Instance. The EC's challenge was directly at odds with the DOJ, who cleared the deal. Deborah Platt Majoras, Deputy Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Statement before the Antitrust Law Section of the State Bar of Georgia (Nov. 29, 2001), https://www.justice.gov/atr/speech/ge-honeywell-us-decision.

customers for the same end use."[30] Over time, the EC set up an ability-incentive-effect framework to consider whether conglomerate mergers will pose competitive concerns. European investigators also assess "plus factors" such as an overlap in customer base to evaluate anticompetitive effects. The new US Merger Guidelines borrow heavily from the EC's language, in particular leveraging a strong market position in closely related markets and instances where bundling could be anticompetitive.[31]

The EC has already rejuvenated its review of conglomerate effects. After the European Courts overturned the EC's challenges to the conglomerate aspects of the *GE/Honeywell* and *Tetra Laval/Sidel* mergers in the early 2000s, the Directorate-General of Competition's pursuit of conglomerate effects took a pause until about 2016.[32] More recent conglomerate theory cases focused on information access and, instead of unwinding deals, the EC has found behavioral remedies palatable for concerns regarding information leakage, interoperability misuse, and mixed bundling.[33] Conglomerate effects investigated in *Dentsply/Sirona*, *Worldline/Equens/Paysquare, Microsoft/LinkedIn*,[34] and *Broadcom/Brocade* were resolved in Phase I, and concerns in *Apple/Shazam* (2018),[35] *Qualcomm/NXP, Telia/Bonnier*, and *Google/Fitbit* were resolved in Phase 2.[36] In *Bayer/Monsanto* and *Essilor/Luxottica*, the EC withdrew its bundling counts after failing to find sufficient evidence of harm during its in-depth investigations.[37]

VI. ANALYSIS: A GAMBLE ON *PROCTER & GAMBLE*

Given the misaligned state of conglomerate merger challenges in both the US and EU, the newly coined entrenchment theory articulated in *Amgen/Horizon* and the new Merger Guidelines appears to be an American course correction of sorts. However, challenges under this theory and the implementation of the Agencies' new Merger Guidelines will likely face an uphill battle in the courts. In comparing US and EU approaches, it is clear that the FTC took a significant risk by asserting only an entrenchment theory of harm in *Amgen/Horizon*; the EC has not brought such a case in the past two decades.

The Agencies' overreliance on *Procter & Gamble* may be fatal to their cause. The case, and the conglomerate effects theory, has been openly criticized by both Agencies consistently over the past two decades.[38] Again, the case

[30] European Comm'n, Directorate-General Competition [hereinafter DG-Comp], *Case M. 8394 – Essilor/Luxottica*, Merger Procedure Regulation (EC) 139/2004 at 39, https://ec.europa.eu/competition/mergers/cases1/202044/m8394_4245_3.pdf (quoting European Commission, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings ¶¶ 91–93, (2008) OJ C 265/6, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF). DG-Comp investigated but ultimately did not find enough evidence to prove their conglomerate effects theory of harm.

[31] *Id.* ¶¶ 194, 198 ("In most circumstances, conglomerate mergers do not lead to any competitive problems. However, foreclosure effects may arise when the combination of products in related markets may confirm on the Merged Entity the ability and incentive to leverage a strong market position from one market to another closely related market by means of tying or bundling or other exclusionary practices. . . . [Bundling] may lead to a reduction in actual or potential competitors' ability or incentive to compete. This may reduce the competitive pressure on the Merged Entity allowing it to increase prices or deteriorate supply conditions in other ways.").

[32] Int'l Competition Network [hereinafter ICN], ICN Teleseminar on Conglomerate Mergers, *Recent EU Conglomerate Mergers and Case Studies* 14 (Oct. 29, 2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/09/MWG_ConglomerateMergersReport.pdf.

[33] ICN, ICN VERTICAL MERGERS COMPARISON STUDY 24 (2019), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/MWG-Vertical-Mergers-Comparison-Study.pdf.

[34] Microsoft was obliged to unbundle its PC products from LinkedIn (i.e., no requirement to preinstall LinkedIn) and to maintain current levels of interoperability with Microsoft's Office suite. *See* ICN, *supra* note **Error! Bookmark not defined.**, at 29.

[35] EC Decision, *Case M.8788* (*Apple/Shazam*) 54 (June 8, 2018), https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1279_3.pdf.

[36] *See generally* ICN, *supra* note **Error! Bookmark not defined.**, at 14–22 (Oct. 29, 2019).

[37] Press Release, European Comm'n, Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions (Mar. 21, 20018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282; Opinion of the Advisory Committee on Mergers, *Case M. 8084-Bayer/Monsanto* (Mar. 8, 2019), https://ec.europa.eu/competition/mergers/cases/additional_data/m8084_12984_3.pdf.

[38] *See supra* notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.**; Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement 2 n.9 (Jan. 18, 2022),

has largely been ignored and it has not been cited by the Seventh Circuit or the Supreme Court for conglomerate effects. It could have been argued that *Procter & Gamble* is factually distinct from *Amgen/Horizon* because the conglomerate effects were considered through a potential competition lens; in that case, the acquirer was a significant potential competitor to Clorox in liquid bleach.[39] In *Amgen/Horizon*, FTC acknowledged that Horizon's two blockbuster products are currently monopolies that have no functional substitutes.[40] The FTC, however, did not claim that Amgen is a potential competitor to Horizon in either of its products. Two sets of wholly distinct pharmaceutical product portfolios are far less related than the products at issue in *Procter & Gamble,* thus reducing the likelihood of potential anticompetitive bundling.

Had *Amgen/Horizon* proceeded to trial, the FTC would have likely lost. In court, the FTC would have likely failed due to the considerable focus on documentary evidence and behavioral remedies in *Microsoft/Activision*.[41] *Microsoft/Activision* put the judicial consideration of behavioral remedies back on the table,[42] and had the FTC continued its stubborn refusal of Amgen's initial offer, it could have led to a similar litigating-the-fix scenario that resulted in a major DOJ loss in the 2022 *United/Change* merger challenge.[43] Second, the FTC lacked evidentiary support for its theory of harm, as it did in recent cases. For example, in *Microsoft/Activision*, Judge Jacqueline S. Corley excoriated the FTC for not bringing any evidence;[44] the *Amgen/Horizon* respondents said the same. Third, judges are loath to be overturned, and it was unlikely that Trump-appointed Judge Kness would have overreached for a novel theory of harm that relied heavily on a currently undecided private litigation. Judge Kness would have likely looked to *United/Change* and *Microsoft/Activision* for a modern-day rule-of-reason approach to evidence and remedies that are on the table. The recent settlement was the best outcome for the FTC.

The *Amgen/Horizon* settlement is a considerable shift from the Agencies' hardline stance against behavioral remedies. The DOJ and FTC's recent but consistent public refutation of behavioral remedies willfully ignores many more recent cases in which behavioral remedies were accepted by the courts.[45]

For its next entrenchment theory case, the FTC may do well to cement their position in more proven Section 2 case law. For example, the agency could cite to *SmithKline Corp. v. Eli Lilly*

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https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf ("The RFI repeatedly cites language from *FTC v. Procter & Gamble Co. …* which then-Judge Kavanaugh described as 'a historical drive-by dicta'").

[39] *See supra* note **Error! Bookmark not defined.**.

[40] *See* Preliminary Injunction Complaint ¶¶ 6–8.

[41] FTC v. Microsoft Corp., 23-cv-02880, 2023 WL 4443412 (N.D. Cal. July 10, 2023) [hereinafter *Microsoft/Activision*].

[42] *Microsoft/Activision*, 2023 WL 4443412 at *15 (distinguishing the procedural facts of *E.I. du Pont).*

[43] United States v. UnitedHealth Group Inc., 630 F. Supp. 3d 118 (D.D.C. Sept. 19, 2022).

[44] *Microsoft/Activision*, 2023 WL 4443412 at *14 ("[T]here are no internal documents, emails, or chats contradicting Microsoft's state intent not to make *Call of Duty* exclusive to Xbox consoles. Despite the competition of extensive discovery in the FTC administrative proceeding, including production of nearly 1 million documents and 30 depositions, the FTC has not identified a single document which contradicts Microsoft's publicly-stated commitment to make *Call of Duty* available on PlayStation (and Nintendo Switch).").

[45] *Oversight for the Enforcement of the Antitrust Laws: Hearing Before the S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights*, (2022) (prepared statement of Fed. Trade Comm'n at 6), https://www.ftc.gov/system/files/ftc_gov/pdf/P210100SenateAntitrustTestimony09202022.pdf ("Specifically, we now strongly disfavor behavioral remedies and will not hesitate to reject proposed divestitures that cannot fully cure the underlying harm."); Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york# ("Experience shows that it is often impossible to craft behavioral remedies that anticipate the complex incentives that drive corporate decision-making . . . Therefore, to restore competition in markets that have been harmed by antitrust violations, we will pursue structural remedies in our conduct cases whenever possible."). *But see* Press Release, Fed. Trade Comm'n, FTC Reaches Proposed Settlement with Surescripts in Illegal Monopolization Case (July 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-reaches-proposed-settlement-surescripts-illegal-monopolization-case (20-year behavioral remedy with Surescripts LLC to prevent Surescripts from "engaging in exclusionary conduct and executing or enforcing non-compete agreements.").

& Co.,[46] where the court found an anticompetitive bundling of pharmaceutical products. By refocusing on a bundling action using Section 2 support, the FTC could potentially force the Supreme Court to address the infamous circuit split between the Third (*LePage v. 3M*) and Ninth Circuits (*PeaceHealth*) regarding bundling,[47] since *LePage* borrows heavily from *SmithKline*. The FTC did reference *LePage* in their Amicus Brief for *Applied v. Medtronic* and would significantly benefit from it becoming the majority approach over *Peace Health*.[48]

VII. WHAT'S TO COME?

Amgen/Horizon and the new Merger Guidelines are certain to raise the cost of mergers for companies and practitioners. The FTC will frame the *Amgen/Horizon* settlement as a win, stating that they have gotten more than they would have had they not challenged the deal. And had the FTC proceeded to, and lost in, court, the agency would have touted any judicial acknowledgement of *Procter & Gamble* as good law as another win. The current administration remains unbowed by its recent court losses and appears to be coming around on behavioral consents. As practitioners and clients should be aware, all signs point to more novel cases like *Amgen* in the future.

[46] 575 F.2d 1056, 1065 (3d Cir. 1978).

[47] *See* Nicholas Economides and Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases*, NYU Antitrust Law Journal Vol. 73 (2009) at 489–495*;see generally* Blake I. Markus, *Bundled Discounts: The Ninth Circuit and the Third Circuit are on Separate LePage's,* Missouri Law Review 73:3 (2008); *see also* Daniel Francis and Christopher John Sprigman, *Antitrust: Principles, Cases and Materials* (2023) at 396–398.

[48] *See supra* notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.**.