Prior Bad Acts and Merger Review

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INTRODUCTION

Consider a merger of two firms in the pharmaceutical industry. Each has previously engaged in antitrust violations. In considering whether to allow the merger, how much weight should the antitrust agencies give to these prior bad acts? How important should this evidence be to courts? These critical questions have not received sufficient attention.

In the 2010 Horizontal Merger Guidelines (the Guidelines), the federal antitrust agencies—the U.S. Department of Justice Antitrust Division (Antitrust Division) and Federal Trade Commission (FTC)—address collusion, one of the two main types of anticompetitive behavior underlying merger challenges.[1] The rationale is simple: the merging parties' previous collusion is a strong indicator that they may engage in similar behavior in the future. We support the Guidelines' attention on this conduct but believe that merger enforcement can be improved in this area.

Since the Guidelines' publication, the treatment of evidence of past coordinated conduct has not been consistent. In some mergers, the agencies have emphasized this factor. For example, in *United States v. Dairy Farmers of America, Inc.*, the Antitrust Division noted in its complaint that "[t]here is a history of anticompetitive coordination, including price-fixing, bid-rigging, and customer allocation in fluid milk markets in the United States."[2] But in other mergers, prior collusion is neglected. For example, the FTC's complaints challenging the Pfizer/Mylan[3] and Teva/Allergan[4] mergers failed to address this conduct. In many cases, defense lawyers have responded to

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[1] *See* DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 7.2, at 25 (2010) [hereinafter MERGER GUIDELINES], https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/R4N2-H6RP].

[2] Complaint at ¶ 28, United States v. Dairy Farmers of Am., Inc., 2020 WL 8370839 (N.D. Ill. 2020) (No. 1:20-cv-2658). AAG Cooley was counsel for the State of Wisconsin in this case. *See also* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 65 (D.D.C. 1998) (indicating that the FTC presented evidence of tacit coordination at trial).

[3] *See* Complaint at 1, *In re* Pfizer, No. C-4727 (F.T.C. Oct. 13, 2020). *But see* Public Statement, FTC, Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter, In the Matter of Pfizer Inc. / Mylan N.V. (Oct. 30, 2020) [hereinafter Chopra Pfizer/Mylan Statement], https://www.ftc.gov/system/files/documents/public_statements/1582382/191_0182_pfizer-mylan_-_dissenting_statement_of_commrs_chopra_and_slaughter_1.pdf [https://perma.cc/H763-47KD].

[4] *See* Complaint, Teva Pharm. Indus. Ltd., No. C-4589 (F.T.C. July 26, 2016); *see also* Bill Wichert, *Allergan Strikes $130M Deal over Drug Price-Fixing Claims*, LAW360 (July 12, 2021, 4:18 PM), https://www.law360.com/articles/1402298/allergan-strikes-130m-deal-over-drug-price-fixing-claims; *infra* notes 58–59 and accompanying text (referencing generic price-fixing litigation in which Teva is defendant).

this inconsistency by not preparing their clients for potential scrutiny of prior antitrust violations.[5] Conversations with state and federal antitrust enforcers have revealed that the merging parties are often surprised when confronted with their prior collusion, as if they did not expect this to be part of the merger inquiry.[6]

The second main type of prior conduct, unilateral behavior, presents even more uncertainty. Nowhere do the Guidelines discuss the relevance of unilateral conduct in the form of a merging party's prior bad acts. We contend that this prior conduct is particularly relevant when: (1) the markets are similar, (2) there is a connection between the prior bad acts and the markets covered by the merger, and (3) there is sufficient proof of the prior bad acts.[7] And if both parties to a merger transaction have engaged in this conduct, it is even more likely that they will do so again in the future as part of a new, larger company.

In evaluating mergers, courts have struggled to assess future harms to competition. In the merger between Sprint and T-Mobile, for example, the court worried that the "[a]djudication of antitrust disputes virtually turns the judge into a fortuneteller" and that courts must "resort to their own tried and tested version of peering into a crystal ball."[8] Given the challenges posed by predicting the future in merger challenges, analyzing prior bad acts—for not only coordinated but also unilateral conduct—may provide useful insights that can assist courts, especially in close cases.

In this Essay, we explain why the agencies and courts should carefully consider previous anticompetitive conduct. We describe how such analysis is consistent with the policies underlying antitrust law first by expanding on the 2010 Guidelines' use of collusive conduct.[9] Second, we argue that prior unilateral conduct should also be considered in merger review. We supplement our discussion of collusive and unilateral behavior by offering case studies involving mergers for which there was strong evidence that each

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[5] Conversations between Gwendolyn J. Lindsay Cooley, National Association of Attorneys General Multistate Antitrust Task Force Chair and Wisconsin Assistant Attorney General for Antitrust and unnamed state and federal enforcers (Sept. 7, 2022).

[6] *Id.*

[7] The closer connection between collusion pre- and post-merger leads us to rely on the Guidelines' conclusion that markets are "conducive to coordinated interaction" when firms with a "substantial share" of the market have previously engaged in collusion in the same market or in separate geographic or product markets with comparable characteristics. *See* MERGER GUIDELINES, *supra* note 1, at 25; *infra* note 94 and accompanying text.

[8] New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 186, 188 (S.D.N.Y. 2020).

[9] *See* MERGER GUIDELINES, *supra* note 1. We recommend that the agencies discuss bad acts in relation to unilateral conduct in the new version of the guidelines currently being considered. *See* DOJ & FTC, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (2022), https://downloads.regulations.gov/FTC-2022-0003-0001/content.pdf [https://perma.cc/8CE9-XSJC].

of the companies had previously engaged in this conduct. We conclude by explaining why, in mergers in which prior bad acts counsel agency action, the array of potential relief should include not just a lawsuit to block the merger but also behavioral remedies.

Our focus in this Essay is the pharmaceutical industry, where examples of collusion and unilateral anticompetitive conduct are compelling and where criticism of inadequate enforcement has been particularly robust.[10] But the analysis we offer could apply across all industries, as our arguments about prior bad acts are not limited to this industry's characteristics.

I. PHARMACEUTICAL INDUSTRY

The pharmaceutical industry plays a crucial role in many Americans' lives. Patients rely on prescription drugs to stay healthy and even to stay alive. Patents are important for pharmaceutical innovation.[11] But a complex regulatory scheme and the lucrative profit streams available to brand-name drug companies that delay generic entry have paved the way for anticompetitive behavior.[12] Some examples include:

(1) "Pay-for-delay" settlements by which brand firms pay generics to delay entering the market;[13]
(2) "Product hopping" from one version of a drug to another to delay generics;[14]
(3) Denying samples that generic manufacturers need to enter the market;[15]
(4) Filing frivolous "citizen petitions" to delay generic approval;[16] and

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[10] *See infra* notes 22–23 and accompanying text.

[11] *See, e.g.*, Wesley M. Cohen, Richard R. Nelson & John P. Walsh, *Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)* 32 tbl.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7552, 2000); Richard C. Levin, Alvin K. Klevorick, Richard R. Nelson & Sidney G. Winter, *Appropriating the Returns from Industrial Research and Development*, 1987 BROOKINGS PAPERS ON ECON. ACTIVITY 783, 797 tbl.2.

[12] Generic drugs, which have the same active ingredients as brand drugs, can lower costs because the manufacturers need not undertake lengthy, expensive clinical trials to demonstrate safety and effectiveness. *See, e.g.*, Michael A. Carrier, Mark A. Lemley & Shawn Miller, *Playing Both Sides? Branded Sales, Generic Drugs, and Antitrust Policy*, 71 HASTINGS L.J. 307, 312 (2020).

[13] *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 140 (2013).

[14] *See, e.g.*, New York v. Actavis PLC, 787 F.3d 638, 643 (2d Cir. 2015).

[15] *See, e.g.*, Mylan Pharms., Inc. v. Celgene Corp., No. 14-cv-2094, 2018 WL 11299447, at *1 (D.N.J. Oct. 3, 2018).

[16] *See, e.g.*, FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 152 & n.7 (3d Cir. 2019).

(5) Alleged price fixing across a range of generic medicines.[17]

This array of anticompetitive conduct has taken place against a background in which the industry has become more and more consolidated. This consolidation, which has led to higher prices,[18] has not been driven by a need for innovation.[19]

One would think, then, that the analysis of pharmaceutical mergers would involve a careful assessment of competitive concerns as well as actual merger challenges. But that is not the case. A comprehensive study by the American Antitrust Institute (AAI) found that between 1994 and 2020, the agency responsible for merger enforcement in the industry, the FTC, "challenged 67 pharmaceutical mergers worth over $900 billion, moved to block only one, and settled virtually all of the remainder subject to divestitures."[20] The result of such a narrow focus on specific markets has been "the swapping of assets within a relatively small group of large and increasingly powerful firms."[21]

This narrow analysis has been criticized. Former Commissioner Rohit Chopra lamented that "[t]he FTC's strategy of focusing on whether pharmaceutical companies have any overlaps in their drug product lineup is narrow, flawed, and ineffective."[22] And Commissioner Rebecca Kelly Slaughter demonstrated "concern[]" that the "analytical approach [based on drug overlaps] is too narrow" and called for an approach looking "more

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[17] *See infra* Part III.

[18] *See, e.g.*, Alice Bonaimé & Ye (Emma) Wang, Mergers, Product Prices, and Innovation: Evidence from the Pharmaceutical Industry 1 (Aug. 12, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3445753 [https://perma.cc/593R-TUGK]; Chintan V. Dave, Aaron S. Kesselheim, Erin R. Fox, Peihua Qiu & Abraham Hartzema, *High Generic Drug Prices and Market Competition: A Retrospective Cohort Study*, 167 ANNALS INTERNAL MED. 145, 151 (2017).

[19] *See* Patricia M. Danzon & Michael A. Carrier, *The Neglected Concern of Firm Size in Pharmaceutical Mergers*, 84 ANTITRUST L.J. 487, 492–97 (2022).

[20] AM. ANTITRUST INST., FROM COMPETITION TO CONSPIRACY: ASSESSING THE FEDERAL TRADE COMMISSION'S MERGER POLICY IN THE PHARMACEUTICAL SECTOR 10 (2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/09/AAI_PharmaReport2020_9-11-20.pdf [https://perma.cc/PH73-JGH2].

[21] *Id.* at 3.

[22] Public Statement, FTC, Dissenting Statement of Commissioner Rohit Chopra, In the Matter of AbbVie, Inc. / Allergan plc 3 (May 5, 2020) [hereinafter Chopra AbbVie/Allergan Dissent], https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf [https://perma.cc/T9UG-VWTW].

broadly" at whether a merger "is likely to exacerbate anticompetitive conduct" or "hinder innovation."[23]

One factor that we believe has not been sufficiently considered in the FTC's merger analysis is the merging firms' previous anticompetitive conduct.[24] That is troublesome given the pervasiveness of antitrust violations among merging pharmaceutical firms. For example, the AAI study mentioned above highlighted the price-fixing indictments the DOJ obtained against Rising, Teva, Taro, Heritage, Glenmark, Sandoz, and Apotex.[25] It also found "approximately 70 drug companies that are defendants in private, state, and federal non-merger antitrust litigations," with "[a]bout 55% of these companies [being] parties to mergers," buyers of divestiture assets, or both.[26] While we recognize that being a defendant in an antitrust case does not rise to the level of a previous violation, such status, when combined with other factors,[27] could be helpful in courts' and the agencies' analysis. The Essay next explains the relevance of prior bad acts for collusive and unilateral conduct in pharmaceutical mergers.

II. COLLUSIVE CONDUCT

In merger analysis, the two traditional theories of competitive harm are based on coordinated effects (which we discuss in this Part and the following Part) and unilateral effects (the focus of Parts IV and V). Stated most simply, the theory of harm based on coordinated effects is that in reducing the number

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[23] Public Statement, FTC, Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Bristol-Myers Squibb and Celgene 1 (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf [https://perma.cc/NLT5-P3LX].

[24] Of course, the FTC's internal deliberations are not open to public view. We reach our conclusions based on cases, including those discussed in Parts III and V, in which we believe a full consideration of prior bad acts would have led to a different outcome. For an industry-specific analysis of serial collusion that concluded that the "densest cartels with histories of collusion" (in which "many have only two or three members") appeared in the pharmaceutical industry, see John M. Connor, Serial Collusion and Cartel Effectiveness: Hypotheses, Empirical Regularities, and Implications for Anti-Cartel Penalties 16 (Aug. 17, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3234365 [https://perma.cc/HMH4-7Q6K].

[25] AM. ANTITRUST INST., *supra* note 20, at 17–18.

[26] *Id.* at 18; *see also id.* at 18–19 (identifying the most active companies as "Sandoz, Watson, Actavis, Par, Mylan, Teva, Impax, Pfizer, Endo, Valeant . . . , Perrigo, Apotex, Allergan, Barr, Taro, Sun, Dr. Reddy's, Amneal . . . , and Schering AG").

[27] For a discussion of our proposed analysis for previous unilateral allegations, see *infra* notes 94–103 and accompanying text.

of firms in the market, a merger makes it easier for the remaining firms to collude.[28] This Part will first introduce the concept of coordinated interaction. It will then argue that prior collusive conduct is a predictor of post-merger coordinated interaction.

A. COORDINATED INTERACTION

The centerpiece of merger analysis is the 2010 Horizontal Merger Guidelines, jointly adopted by the FTC and DOJ Antitrust Division. The Guidelines specify that a merger "may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers."[29] Coordinated interaction "involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."[30] "These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals" and "can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals."[31]

The Guidelines make clear that the agencies presume that markets "are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly."[32] The Guidelines also consider collusion in separate geographic or product markets if there are comparable characteristics.[33] And they examine "[f]ailed previous attempts at collusion," which "suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts," with "a merger . . . tend[ing] to make success more likely."[34]

B. PREDICTIVE EFFECT

The agencies consider prior collusion because of its predictive effect. One reason is that previous collusion shows that the firms have been able to solve

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[28] *See* MERGER GUIDELINES, *supra* note 1, § 7.1, at 25.
[29] *Id.* § 7, at 24; *see also* § 1, at 2 ("A merger . . . can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals.").
[30] *Id.* § 7, at 24.
[31] *Id.*
[32] *Id.* § 7.2, at 25.
[33] *See id.*
[34] *Id.*

their "cartel problems."[35] In particular, they have "reach[ed] consensus on terms of coordination; deterr[ed] cheating on that consensus; and prevent[ed] new competition, whether in the form of expansion by firms that are currently rivals but not part of the coordinated arrangement or in the form of new entry."[36] Professor Christopher Leslie has explained that prior price-fixing behavior on the same product shows that it is conducive to cartelization and that firms have created sufficient trust and solved coordination problems necessary to run a conspiracy,[37] and also that firms can learn from their prior cartel activity to improve future price-fixing attempts.[38] Applying the concepts we develop more fully below in the context of unilateral behavior,[39] the combined firm has a heightened ability and incentive to engage in collusion.

Prior collusion increases the likelihood of similar future behavior not only because of an enhanced ability to solve cartel problems, but also because of recidivism, which is "the act of . . . repeating an undesirable behavior after having been sanctioned previously for that behavior."[40] A company that has already engaged in collusive conduct is more likely to do so in the future, having learned from past mistakes or litigation.[41] A study of defendants in

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[35] *See* ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 306 (4th ed. 2022). In the United States, "cartel" behavior includes "price-fixing; volume, customer, and market allocation; and bid-rigging." *Chapter 4: International Anticartel Enforcement and Interagency Enforcement Cooperation*, U.S. DEP'T OF JUST., ANTITRUST DIV. (June 25, 2015), https://www.justice.gov/atr/chapter-4 [https://perma.cc/4739-UMDB].

[36] GAVIL ET AL., *supra* note 35.

[37] *See* Christopher R. Leslie, *Foreign Price-Fixing Conspiracies*, 67 DUKE L.J. 557, 580–86, 595–96 (2017).

[38] *See* Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581, 1614 (2021) (noting that "conspirators learn from their prior price-fixing experience and adjust their strategies to create even more stable cartels moving forward"); *see also* Connor, *supra* note 24, at 4 ("A history of cartel participation helps would-be managers to identify the external market conditions conducive to collusion, to recruit other possibly skeptical managers of other leading suppliers to the joint venture, to negotiate a mutually acceptable method of sharing the forthcoming monopoly profits, and to assure recruits that the chance of detection by the authorities is an acceptable risk.").

[39] *See infra* Section IV.A.

[40] John M. Connor, *Recidivism Revealed: Private International Cartels 1990-2009*, 6 COMPETITION POL'Y INT'L 101, 103 (2010), https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/Connor.pdf [https://perma.cc/UL5Z-G4ZP]. We use "recidivism" in this Essay as a behavioral descriptor rather than an economic one.

[41] *See, e.g.*, Wouter P.J. Wils, *Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis*, 35 WORLD COMPETITION 5, 14 (2012) ("[Offenders] learn from a first

the European Union (EU) found that between 1998 and 2006, 23% of cartel decisions imposed recidivism penalties.[42] Commentators have identified an "awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels[,]" which "suggests a confirmed culture of business delinquency."[43] A former Antitrust Division official observed that "cartel participants tend to be recidivists[,]" citing as an example Hoffmann-La Roche, "which continued its participation in the vitamin conspiracy even as it was entering into a plea agreement for its participation in the citric acid cartel[,]" and the "domestic building materials industry, where one generation of executives engaged in cartel activity during the mid-1980s and their sons did likewise after they took over the reins of the businesses in the 1990s."[44] In 2010, John M. Connor found "an acceleration in the rate of recidivism after 1999" among the most frequent cartel participants.[45]

Antitrust enforcers have pursued claims against defendants that have participated in multiple alleged conspiracies. Samsung, to pick one example, pleaded guilty and paid a $300 million fine for its participation in a price-fixing conspiracy in the DRAM (dynamic random access memory) chip market[46] and then was a defendant in a separate case, which alleged

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investigation and prosecution by a competition authority how they can better hide their infringements or better organize their defence."). The effects of recidivism, and collusion more generally, are particularly pronounced where the merger combines a serial colluder and a "maverick" that had previously resisted price increases. *See* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 177–79 (2002).

[42] John M. Connor, *Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines*, 32 EUR. COMPETITION L. REV. 27, 30 n.34 (2011). For a discussion of how Europe more carefully considers recidivism than the United States does, see John M. Connor, *Oceanic Disparities in Cartel-Recidivism Attitudes and Penalties* 1 (2016) [hereinafter Connor, *Oceanic Disparities*], https://ssrn.com/abstract=2757784 [https://perma.cc/J78J-MV8S] (calling cartel recidivism a "serious, large-scale problem [for] EU antitrust officials" but one that is "rarely mentioned in DOJ documents or speeches" and "dismissed as empirically unimportant for cartel conduct in the United States").

[43] Christopher Harding & Alun Gibbs, *Why Go to Court in Europe? An Analysis of Cartel Appeals 1995–2004*, 30 EUR. L. REV. 349, 369 (2005).

[44] William J. Kolasky, Deputy Assistant Att'y Gen., DOJ, Antitrust Div., Antitrust Compliance Programs: The Government Perspective (July 12, 2002), http://www.justice.gov/atr/public/speeches/224389.htm [https://perma.cc/HB44-DK4Z]. For additional examples, see Connor, *Oceanic Disparities*, *supra* note 42, at 5–7 (citing examples of Mitsubishi, Hoechst AG, ADM, Akzo Nobel NV, and BASF AG).

[45] Connor, *supra* note 40, at 114.

[46] *See* Press Release, DOJ, Samsung Agrees to Plead Guilty and to Pay $300 Million Criminal Fine for Role in Price Fixing Conspiracy (Oct. 13, 2005),

involvement in a price-fixing conspiracy in the TFT-LCD (a type of liquid crystal display, or LCD) market.[47] "[S]erial collusion is positively related to the height of achieved overcharges and episodic longevity" because it is "a behavioral indicator of a corporate entity's knowledge and experience of organizing (launching) a cartel, instilling effective internal rules for stimulating a high degree of intra-cartel cooperation (i.e., 'discipline'), and lowering the probabilities of detection by antitrust authorities."[48]

Recidivism is even more likely when the parties have engaged in prior collusion, especially in the same industry or with each other. For example, in its complaint to enjoin the merger of Penguin Random House and Simon & Schuster, the Antitrust Division explained that "[t]he Big Five [publishers] have a history of collusion."[49] The Division explained that "[i]n 2012 the United States filed a complaint . . . alleging that five publishers—including Penguin and Simon & Schuster—conspired with Apple to increase the prices of e-books," and that "[a]fter a trial, the . . . [j]udge found that Apple and the publishers had indeed engaged in a price-fixing conspiracy in violation of Section 1 of the Sherman Act[.]"[50] In its November 2022 ruling granting an injunction blocking the merger, the court recognized that "a history of collusion or attempted collusion is highly probative of likely harm from a merger."[51]

Consistent with our discussion in this Section, the leading antitrust treatise considers previous collusion attempts "as 'exacerbating' factors sufficient to warrant a merger challenge under circumstances where structural

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https://www.justice.gov/archive/atr/public/press_releases/2005/212002.htm#:~:text=(Samsung)%2C%20a%20Korean%20manufacturer,the%20Department%20of%20Justice%20announced [https://perma.cc/Y8NE-GNX3].

[47] Missouri v. AU Optronics Corp., No. 10-cv-3619 (N.D. Cal. 2013); *see also* Kelly B. Kramer, *Judge Orders Record Penalties Against AU Optronics in Criminal Antitrust Case*, MAYER BROWN (Sept. 21, 2012) [https://perma.cc/WG9X-CK4X] ("In exchange for providing information about the conspiracy, Samsung was accepted into the DOJ's leniency program[,]" which allowed it to "avoid[] criminal prosecution for participating in the cartel."). AAG Cooley was counsel for the State of Wisconsin in this case.

[48] Connor, *supra* note 24, at 4.

[49] Complaint at ¶ 53, United States v. Bertelsmann SE & Co. KGaA, 2022 WL 16748157 (D.D.C. Nov. 2, 2021) (No. 21-cv-2886).

[50] *Id.* The Second Circuit affirmed this judgment. *See* United States v. Apple, Inc., 791 F.3d 290, 291 (2d Cir. 2015). AAG Cooley was counsel for the State of Wisconsin in this case. In the past, the FTC has also successfully argued that a history of collusion was relevant. *See In re* Hosp. Corp. of Am., 106 F.T.C. 361, 443 (1985) (noting that "[t]he inference from market data that collusive behavior is more probable after the [hospital] acquisitions . . . is strengthened by consideration of the history of interfirm behavior in th[e] market"), *aff'd sub nom.* Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986).

[51] United States v. Bertelsmann SE & Co. KGaA, No. 21-cv-2886, 2022 WL 16748157, at *27 (D.D.C. Nov. 7, 2022).

evidence alone would be insufficient."[52] And, in fact, the treatise suggests that "any significant merger by one of the firms involved in the [previous] attempts [to engage in price fixing] should be presumptively unlawful."[53]

We agree that prior collusion increases the likelihood that the merged company will engage in the conduct.[54] Although this conclusion seems straightforward, given the inconsistencies in scrutiny we discussed above,[55] we would encourage the agencies to apply it more robustly.

III. COLLUSION CASE STUDY: PFIZER/MYLAN AND COORDINATED CONDUCT

The Pfizer/Mylan merger offers a case study that demonstrates how the agencies could more directly consider prior collusion. The FTC allowed this merger to proceed, only requiring the divestiture of seven[56] out of roughly 3,000 products.[57]

At the time of the merger, Pfizer and Mylan were involved in litigation on an issue at the center of concern with anticompetitive mergers: increased coordination. Pfizer and Mylan are alleged to have been involved in allocating the market for a number of drugs while systematically increasing prices as part of an alleged overall scheme to maximize company profits and minimize competition.[58] Nearly all of the states filed a 600-page complaint with comprehensive allegations, and there have been other follow-on private

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[52] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 168 (4th ed. 2016).

[53] *Id.* (citing FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998), in which the court "grant[ed] [a] preliminary injunction against [the] merger where there was some evidence that the participants had coordinated prices earlier" and stated that even though it was "not convinced from the record that the Defendants actually engaged in wrongdoing, it is persuaded that in the event of a merger, the[y] would likely have an increased ability to coordinate their pricing practices"); *see also id.* at 168–69 n.7 (citing FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 158 (D.D.C. 2004), and criticizing transaction where "a merger participant wished to cartelize the market, and a merger could only make such regimentation more likely").

[54] We anticipate the prior collusion being proved in court. For conduct not at that stage, we propose consideration of factors discussed in the context of unilateral conduct below. *See infra* notes 100–103 and accompanying text.

[55] *See supra* notes 2–6 and accompanying text.

[56] Press Release, FTC, FTC Approves Final Order Imposing Conditions on Combination of Pfizer Inc.'s Upjohn and Mylan N.V. (Jan. 28, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/01/ftc-approves-final-order-imposing-conditions-combination-pfizer-incs-upjohn-mylan-nv [https://perma.cc/2DVK-QYZH].

[57] Chopra Pfizer/Mylan Statement, *supra* note 3, at 1.

[58] *See infra* notes 59–62 and accompanying text.

lawsuits against the industry by direct and indirect purchasers,[59] not to mention an Antitrust Division investigation for criminal market allocation and price fixing.[60]

Pfizer and Mylan operated in similar markets. They are both small-molecule pharmaceutical manufacturers of branded and generic drugs. As a result, if prior collusion were proven in court[61] and the companies possessed a substantial share of these markets, then we would suggest a presumption that their merger is unlawful.[62] But even if these elements are not satisfied, additional evidence of concern stems from the combined firm's ability and incentive to engage in collusive conduct.

First, the merger increased their *ability*. Then-Commissioner Chopra explained in his dissent that, compared to the current "wide-ranging price fixing and market allocation conspiracy in the generic drug industry" in which "both firms and two of Mylan's top executives have been accused," these "alleged antitrust crimes may be even easier to perpetrate by the new entity" with its "expanded empire of generic drug products."[63]

Commissioner Chopra noted how the merger could increase the merged entity's ability "to engage in similar – or even more harmful – collusive conduct."[64] In particular, it "would become the top supplier of generic drugs by global revenues, with an enormous number of products and a broad range of competitors with which to engage in quid pro qo collusive arrangements."[65] As a result, a single competitor would have control over more generic drugs, which could make it "easier to form a cartel and punish those who don't adhere to its terms."[66] This concern is consistent with the literature on how concentrated markets lend themselves to collusion.[67]

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[59] *See* Complaint, Connecticut v. Sandoz, Inc., No. 20-cv-802 (D. Conn. June 10, 2020) [hereinafter States' Dermatology Complaint]. AAG Cooley represents the State of Wisconsin in this case.

[60] *See* Pfizer Inc., *Current Report (Form 8-K)*, SEC 175 (Aug. 6, 2020), https://investor.viatris.com/node/6561/html [https://perma.cc/6FER-A8V3]; Mylan N.V., *Annual Report (Form 10-K)*, SEC 153 (Dec. 31, 2019), https://www.annualreports.com/HostedData/AnnualReports/PDF/NASDAQ_MYL_2019.pdf [https://perma.cc/NMA7-QN77] (both cited in Chopra Pfizer/Mylan Statement, *supra* note 3, at 2 n.7).

[61] For a discussion of other conduct that does not reach this level, see *infra* notes 100–103 and accompanying text.

[62] *See supra* notes 52–55 and *infra* note 94 and accompanying text.

[63] Chopra Pfizer/Mylan Statement, *supra* note 3, at 2.

[64] *Id.* at 3.

[65] *Id.*

[66] *Id.*

[67] Leslie, *supra* note 38, at 1590 (explaining that "markets with fewer firms are more susceptible to cartelization—a smaller group of competitors is better able to solve the

Second, the merged entity would have an increased *incentive* to exploit an "enormous profit potential . . . from collusion."[68] For starters, larger firms tend to obtain a higher percentage of the cartel profits, which makes collusion more attractive for the merged firm.[69] In particular, "[b]y trading favorable competitive terms in one market for favorable competitive terms in another market, it may be easier for competing firms to reach mutually beneficial terms of trade and punish each other for any deviations."[70]

Commissioner Chopra noted that "Pfizer and Mylan allegedly did just that."[71] Pfizer's generics division, Greenstone, and Mylan were "charged with trading customers across different drug markets."[72] For example, then-Mylan's president (and current president of the combined company, Viatris) Rajiv Malik allegedly was willing to "play fair" and cede two large companies to Heritage because the latter had previously allowed Mylan to enter another market without competition.[73] And Greenstone was a "primary player[]" in the market for a topical antibiotic used to treat acne in which it "adhered to the 'fair share' understanding . . . and coordinated several significant price increases."[74]

In short, considering the combined firm's ability and incentive to engage in collusive conduct aligns with the Guidelines' attention to previous collusion in similar markets. And evidence that two companies have already colluded increases the likelihood that they will do so again, this time from a position of even greater strength.

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coordination and trust problems that can prevent cartel formation or destabilize an existing cartel" because a "smaller number of negotiators makes it easier for the conspirators to agree on a cartel price, to allocate market shares, to conceal their collusion, to develop enforcement mechanisms, and to detect and punish cheaters").

[68] *See* Chopra Pfizer/Mylan Statement, *supra* note 3, at 3.

[69] As one example, Archer Daniels Midland (ADM) tried to increase its market share before joining the international lysine cartel. *See* John M. Connor, *Lysine: A Case Study in International Price-Fixing*, 13 CHOICES 13, 14–15 (1998).

[70] Chopra Pfizer/Mylan Statement, *supra* note 3, at 3.

[71] *Id.*

[72] *Id.* (emphasis omitted).

[73] App. to Pl.'s Mot. to Unseal Redacted Information at 3, *In re* Generic Pharm. Pricing Antirust Litig., No. 17-cv-3768 (E.D. Pa. Feb. 4, 2019); *see also* Chopra Pfizer/Mylan Statement, *supra* note 3, at 4 (noting that Malik "allegedly conceived and directed many of the schemes" underlying the price-fixing and market allocation strategy).

[74] States' Dermatology Complaint, *supra* note 59, ¶ 1299.

IV. UNILATERAL CONDUCT

Beyond confirming the importance of prior bad acts in coordinated effects cases, we believe the agencies should also examine prior *unilateral* anticompetitive conduct. The agencies have recognized a role for unilateral effects where "[a] merger can enhance market power simply by eliminating competition between the merging parties . . . even if the merger causes no changes in the way other firms behave."[75] Our concept of unilateral bad acts in this Essay extends beyond the unilateral effects discussed in the Guidelines. In particular, it considers prior bad acts that do not fall into the settings that the Guidelines contemplate for unilateral effects of "differentiated products," "markets where sellers negotiate with buyers or prices are determined through auctions," "reductions in output or capacity in markets for relatively homogenous products," and "diminished innovation or reduced product variety."[76]

This Part first will discuss the importance of considering a firm's ability and incentive to engage in unilateral anticompetitive behavior. Second, it will offer a three-factor framework to determine when prior bad acts should be considered, with this analysis focusing on the similarity of markets, connection of the activity to the relevant markets, and high level of proof.

A. ABILITY AND INCENTIVE

Crucial to the analysis are a firm's ability and incentive to engage in anticompetitive conduct. The Horizontal Merger Guidelines recognize that "[e]nhanced market power may . . . make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct."[77] They explain that a merger enhances market power if it "harm[s] customers as a result of diminished competitive . . . incentives."[78] And they make clear that a merger between competing sellers "prevents buyers from playing those sellers off against each other in negotiations," which can "significantly enhance the ability and incentive of the merged entity to obtain a result more

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[75] MERGER GUIDELINES, *supra* note 1, § 1, at 2; *see also id.* § 6, at 20 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition.").
[76] *See id.* § 6, at 20.
[77] *Id.* § 1, at 2.
[78] *Id. See also id.* (noting that a merger also enhances market power if "it is likely to encourage one or more firms to raise price, reduce output, [or] diminish innovation").

favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger."[79]

First, there is a heightened *ability* to engage in anticompetitive conduct. As companies get larger, they have more assets, and also more leverage. In the pharmaceutical sector, they might have the ability to engage in leveraging or bundling of drugs, as we note in our discussion below of the AbbVie/Allergan merger.[80] For another example, mergers between large drug firms with "product portfolios span[ning] multiple therapeutic markets . . . increase their bargaining leverage in negotiations with pharmacy benefit mangers (PBMs)."[81] In particular, these firms are likely to have "'must-have' products (that payers cannot exclude from their formularies) or blockbusters (drugs with very high sales . . .)."[82] The combined firm can leverage these products "through a bundled strategy, tying access and rebates on the blockbuster drug to preferred or even exclusive positioning for its other drugs, which effectively limits or blocks access to rival drugs."[83]

In addition, the larger a firm is, the easier it is to finance a takeover of an incipient challenger. Large firms, for example, can use revenues from sales to "fund their marketing, in-house R&D, and acquisitions."[84]

The combined firm also has a larger toolkit of litigation resources and may be more willing and able to engage in long-running patent litigation to exclude potential rivals. Celgene's acquisition of Abraxis BioScience is one example. In that transaction, which reflects how litigation can increase when a smaller rival is acquired by a larger company, Celgene touted "the opportunity to leverage [its] clinical, regulatory, and commercial capabilities."[85] Extensive patent litigation followed, and Celgene settled

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[79] *Id.* § 6.2, at 22.
[80] *See infra* note 105 and accompanying text.
[81] Danzon & Carrier, *supra* note 19, at 492.
[82] *Id.* at 490.
[83] *Id.* at 500. A similar form of leverage applies where "'crown jewel' or dominant hospitals . . . cannot be excluded from a health insurer's hospital network." *Id.* at 513 n.74; *see id.* at 512 n.70 (providing examples).
[84] *Id.* at 508. For examples outside the pharmaceutical industry, see Substitute Amended Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 20-cv-3590 (D.D.C. Sept. 8, 2021) (challenging Facebook's acquisition of Instagram and WhatsApp); United States v. Am. Can Co., 230 F. 859, 875 (D. Md. 1916) (finding monopolization where company "began to [close] plants [as] soon as it got possession of them," which led to "[t]wo-thirds of the plants bought [being] abandoned within two years of their purchase").
[85] Press Release, Celgene, Celgene to Acquire Abraxis BioScience Inc. (June 30, 2010), https://ir.celgene.com/press-releases-archive/press-release-details/2010/Celgene-to-Acquire-Abraxis-BioScience-Inc/default.aspx [https://perma.cc/UH2X-FDX8].

multiple patent lawsuits against potential rivals, including Elan[86] and Actavis (then owned by Teva).[87] Celgene then attempted to petition the U.S. Food and Drug Administration (FDA) to require generic competitors to perform additional testing before approval, but the agency mostly rejected this request.[88]

The combined firm may also be more willing and able to create a patent thicket to exclude potential rivals. An example is provided by the acquisition of Knoll Pharmaceuticals by Abbott Labs (now AbbVie) from German chemicals company BASF. Abbott Labs transformed Knoll's biologic drug intended to treat rheumatoid arthritis into a drug treating multiple indications, "meticulously buil[ding] a wall of intellectual property — sometimes called a 'patent thicket' — around Humira and each new indication."[89]

A final example of large firms' advantages is provided by "pay for delay" settlements. As the Supreme Court explained in *FTC v. Actavis*, market power can be inferred from a large payment (more than anticipated litigation costs and the value of generic services) from a brand firm to a generic company as part of an entry-delaying settlement.[90] Such a payment, which would be more likely as the company gets larger, "diminishes the expected period of competition and harms consumers."[91]

In addition to a heightened ability to engage in anticompetitive conduct, there is an increased *incentive* to do so.[92] Why? To protect higher monopoly

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[86] *See* Carolina Bolado, *Celgene Strikes $78M Deal in Elan Abraxane IP Suit*, LAW360 (Feb. 24, 2011), https://www.law360.com/articles/228152/celgene-strikes-78m-deal-in-elan-abraxane-ip-suit [https://perma.cc/C8CF-6UXQ].

[87] Celgene, *Current Report (Form 8K)*, SEC at 2 (Jan. 26, 2018), https://www.sec.gov/Archives/edgar/data/816284/000114420418004068/tv484193_8k.htm [https://perma.cc/T6ME-3BUT].

[88] *See FDA Mostly Shoots Down BMS' Petition to Halt Abraxane Generics*, FDANEWS (July 9, 2021), https://www.fdanews.com/articles/203495-fda-mostly-shoots-down-bms-petition-to-halt-abraxane-generics [https://perma.cc/8NC6-CWB5].

[89] Jonathan Gardner, *Two Decades and $200 Billion: AbbVie's Humira Monopoly Nears its End*, BIOPHARMA DIVE (Mar. 17, 2022), https://www.biopharmadive.com/news/humira-abbvie-biosimilar-competition-monopoly/620516/#:~:text=AbbVie%20sells%20Humira%20today%20because,million%20to%20%241%20billion%20annually [https://perma.cc/D79T-FVBK].

[90] FTC v. Actavis, Inc., 570 U.S. 136, 157 (2013) (noting that the "'size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power'—namely, the power to charge prices higher than the competitive level").

[91] Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating* Actavis, 28 ANTITRUST 16, 16 (2013).

[92] Additional insights could be gleaned from the literature on corporate culture, which reveals that some firms are more prone to violate antitrust law. *See, e.g.*, D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 804 (2013) (stating that "[i]ncentives within the firm are strong factors in shaping the behavior of the firm and its agents" and

profits. Put simply, there is more at stake. Because they have more product line vulnerabilities, large companies may feel more compelled to engage in anticompetitive conduct. Given the significant reduction in monopoly profits after generics enter the market, brand firms have engaged in an array of anticompetitive conduct to delay generic entry.[93]

Whether a merger increases the combined company's ability and incentive to engage in collusion is a key inquiry in merger analysis. Evidence that the two companies have already colluded increases the likelihood that they will do so again, this time from a position of even greater strength.

B. PROPOSED FRAMEWORK

How much weight should an agency give to an allegation of previous wrongdoing? We propose a three-factor framework for determining when to consider unilateral prior bad acts in merger analysis.[94]

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that "[f]or a cartel to avoid detection by a participating firm's employees, there typically needs to be some level of management that actively participates in the cartel and other employees who either are unaware of or turn a blind eye to such behavior"); *see also* Marina Lao, *Reimagining Merger Analysis to Include Intent*, 71 EMORY L.J. 1035, 1058 (2022) (defending use of intent in merger analysis and noting that "statements made by the company's senior management relating to the transaction" and "business documents justifying the merger or acquisition to the acquiring firm's board of directors . . . can serve as a helpful guide to decision-makers who must assess the proposed acquisition's future effects on competition").

[93] *See supra* notes 13–17 (discussing examples of pay-for-delay settlements, product hopping, sample denials, frivolous citizen petitions, and alleged generic price fixing). For an example from a different setting, see Steven C. Salop, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits* 2 (Apr. 28, 2021) (draft manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839631 [https://perma.cc/2N3H-G733] (noting how a "dominant firm" has "the incentive and ability to outbid a nascent competitor for access to distribution services or other inputs that are essential to the viability of the nascent competitor").

[94] We envision these factors being most important in "close cases"—*see infra* notes 169–171—though they could also be considered as "plus factors" supporting a lawsuit or more robust remedies. *See, e.g.*, William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 405–06 (2011) (listing "plus factors" that push rivals' parallel pricing over line into antitrust liability). Similar to the Merger Guidelines, we would not require the agencies to show these factors for cases involving prior collusion if the conduct involves the same market or separate geographic or product markets with comparable characteristics. *See infra* notes 96–97 and accompanying text. In these cases, as long as the firms have a "substantial share" of the market, MERGER GUIDELINES, *supra* note 1, § 7.2, at 25, we would suggest a presumption that the merger harms competition. *See supra* notes 52–55 and accompanying text.

The first factor considers the *similarity of the markets*. This factor is supported by the Guidelines, which, as discussed above in the context of prior collusion,[95] provide that the agencies presume that markets "are conducive to coordinated interaction" if firms "previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly."[96] This factor is also supported by the Guidelines' consideration of prior bad acts in separate geographic or product markets if "the salient characteristics of that other market . . . are closely comparable to those in the relevant market."[97] Our first factor is designed not as an additional market definition burden but instead as a means to ensure that the companies are operating in the same general markets. The reason is that prior bad acts in separate markets are less likely to be repeated in the future because the markets are likely to have different characteristics.

For example, a merger of companies that had engaged in prior unilateral bad acts in the markets of "brand name drugs" or "generic drugs" would satisfy this factor. In contrast, a merger of a brand-drug manufacturer and a fitness center (both of which had engaged in prior antitrust violations) would not satisfy the factor.

Second is the *connection of the prior bad acts to the markets covered by the merger*. We add this factor (which the Guidelines do not require for collusion) because there is a more expansive array of potential forms of unilateral behavior than is presented by the narrower conduct of collusion, which could make it harder to extrapolate from prior to future conduct. In its prospective review, the agencies will not know what conduct the merged firm will undertake. But it will know the activity in which the companies previously engaged. The predictive effect of these prior bad acts is likely to be highest if that conduct is relevant to the markets in which the merged firm will participate.

For example, abuse of the FDA regulatory process or conduct delaying generic entry would usually be relevant when the merger will implicate markets in which similar conduct would be expected. In contrast, prior tortious conduct (that also presents an antitrust issue) typically would not be conduct likely to be repeated, in other words, not relevant to the markets covered by the merger.

An example of a company that presents these issues is Nestlé. In their debate in the AbbVie/Allergan merger about whether Nestlé would be an appropriate buyer of divested assets, three FTC Commissioners contended that the company was "involved in the pharmaceutical industry for over 40

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[95] *See supra* note 32 and accompanying text.
[96] MERGER GUIDELINES, *supra* note 1, § 7.2, at 25.
[97] *Id.*

years."[98] In contrast, Commissioner Chopra dissented, stating that Nestlé was "not a pharmaceutical company."[99] If Nestlé had been a participant in the pharmaceutical industry, its engagement in tortious conduct would not be relevant to the merger analysis.

Third is *a high level of proof of the prior bad acts*. Relevant here would be whether the allegations of prior wrongdoing have been proven in court,[100] the amount or character of documentary or testimonial evidence of past wrongdoing,[101] the number of previous offenses, the recency of the allegations, and whether the past conduct was civil or criminal.[102] These inquiries are designed to confirm the severity and reliability of the prior bad acts.

Proof in court, significant evidence, multiple offenses, recent allegations, and criminal conduct all weigh in the direction of more serious prior bad acts. Not every one of these factors needs to be satisfied, but—with the exception of proof in court and criminal conduct—the presence of multiple factors will typically be required to demonstrate the severity of the prior act.[103]

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[98] Public Statement, FTC, Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson Concerning the Proposed Acquisition of Allergan plc by AbbVie Inc. 5 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574619/abbvie-allergan_majority_statement_5-5-20.pdf [https://perma.cc/HLF7-9HK9].

[99] Chopra AbbVie/Allergan Dissent, *supra* note 22, at 8.

[100] While proof after verdict is most persuasive, we would also suggest at least some consideration after denial of summary judgment and even a motion to dismiss. In addition, the agencies should find it easier to rely on prior conduct that has been determined to be anticompetitive than conduct whose lawfulness is unsettled. And for conduct for which not only the legality, but also the anticompetitive nature, is disputed (like patent thickets), the company would need to have engaged in other concerning conduct for this factor to be applicable.

[101] For a discussion of how firms destroy documentary evidence (and falsify exculpatory documents), see Christopher R. Leslie, *How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence*, 2021 U. ILL. L. REV. 1199, 1219–28.

[102] This factor is not meant to diminish the significance of civil antitrust violations but rather to emphasize the magnitude of criminal offenses.

[103] Some of these factors are consistent with the consideration of "prior bad acts" law from other disciplines. *See, e.g.*, FTC v. Vyera Pharms., LLC, No. 20-cv-706, 2021 WL 5154119, at *1 (S.D.N.Y. Nov. 5, 2021) (allowing FTC to offer evidence that "Pharma Bro" Martin Shkreli restricted distribution systems of other drugs to show "motive, intent, plan, knowledge, [or] the absence of mistake" under Federal Rule of Evidence 404(b)); State v. Landrum, 528 N.W.2d 36, 41 (Wis. Ct. App. 1995) (evidence of other acts "is relevant if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act").

V. UNILATERAL CASE STUDY: ABBVIE/ALLERGAN & UNILATERAL CONDUCT

A case study involving AbbVie and Allergan may be helpful to examine unilateral conduct. The FTC approved the merger, requiring only that the merged company divest three drugs.[104] But red flags should have been raised by the smorgasbord of prior conduct in which the firms had engaged.[105]

A. ABBVIE

AbbVie offered three forms of anticompetitive behavior: pay-for-delay settlements, patent thickets, and sham litigation.

1. Pay-for-Delay Settlements

First were settlements. In *Federal Trade Commission v. Actavis*, the Supreme Court held that agreements in which brand-name drug companies pay generic firms to delay entering the market "tend to have significant adverse effects on competition" and could violate the antitrust laws.[106] The reason is that "payment in return for staying out of the market . . . keeps prices at patentee-set levels," with the payment "provid[ing] strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market."[107]

The first generation of settlements involved cash.[108] The settling parties then learned to disguise payments, including through arrangements for

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[104] *See* Press Release, FTC, FTC Imposes Conditions on AbbVie Inc.'s Acquisition of Allergan plc (May 5, 2020), www.ftc.gov/news-events/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc [https://perma.cc/4E3Y-Q28J].

[105] In addition to the conduct discussed in this Part, the merger threatened to increase the combined company's leverage "to engage in 'portfolio contracting' and 'bundled rebates' across its portfolio of drugs." Chopra AbbVie/Allergan Dissent, *supra* note 22, at 16. Then-Commissioner Chopra stated that "[t]he evidence in the investigation suggests that AbbVie currently uses its bargaining leverage from its blockbuster drug Humira to preference its other immunology drugs" and worried that rebating "might act as a barrier to entry and expansion for other drugmakers with less bargaining leverage." *Id.* In a different proceeding involving similar conduct, the court dismissed Shire's lawsuit against Allergan in connection with its dry eye disease treatment, Restasis. Shire US, Inc. v. Allergan, Inc., 375 F. Supp. 3d 538, 540 (D.N.J. 2019).

[106] FTC v. Actavis, Inc., 570 U.S. 136, 148 (2013).

[107] *Id.* at 154.

[108] *See, e.g.*, *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1331 (Fed. Cir. 2008) (finding that brand paid generic competitor $398 million in cash).

generic manufacturers to underpay for brand products. In *Federal Trade Commission v. AbbVie*,[109] the FTC challenged such an agreement, claiming that AbbVie paid generic firm Teva to delay entering the market with a generic testosterone gel by offering its own generic (known as an "authorized generic") version of cholesterol drug TriCor at "a price that is well below what is customary in such situations."[110]

The FTC alleged that "the supply of TriCor was 'extremely valuable' to Teva" and that Teva expected that its "net sales . . . would be nearly $175 million over a four-year period."[111] The Third Circuit rejected the district court's grant of a motion to dismiss, finding that "[t]he payment was plausibly 'large'" and that it "was also plausibly 'unjustified'" based on the allegations that "the TriCor deal 'cannot be explained as an independent business deal from Abbott's perspective.'"[112] In particular, AbbVie "had no incentive to increase . . . generic competition from Teva on another of its blockbuster products," with the TriCor deal being "highly unusual" in other respects.[113] For example, the royalty terms were "significantly worse for [AbbVie]" than was "usual in authorized-generic agreements," and "AbbVie expected to lose roughly $100 million in TriCor revenues as a result of the deal."[114] The FTC eventually withdrew its case given the Supreme Court's ruling that the agency is not entitled to the remedy of disgorgement, but not before entering into agreements by which AbbVie and Teva were "subject to Commission orders preventing them from entering into certain reverse-payment settlements."[115]

2. Sham Litigation

Another form of anticompetitive conduct involves "sham" litigation. Plaintiffs making such a claim must show that the litigation was subjectively and objectively baseless. Given the importance of petitioning conduct, courts almost never allow these claims to proceed. But in *Federal Trade Commission v. AbbVie*, they did.[116] The district court, affirmed in large part

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[109] FTC v. AbbVie Inc., 976 F.3d 327 (3d Cir. 2020).
[110] FTC v. AbbVie Inc., 107 F. Supp. 3d 428, 436 (E.D. Pa. 2015). Some of the conduct discussed refers to AbbVie's predecessor Abbott Labs, Inc.
[111] *AbbVie Inc.*, 976 F.3d at 357 (citation omitted).
[112] *Id.* (citation omitted).
[113] *Id.* (citation omitted).
[114] *Id.* (alteration in original) (internal quotation marks omitted).
[115] *AbbVie Inc., et al.*, FTC (July 30, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/121-0028-abbvie-inc-et-al [https://perma.cc/VT6M-LBWJ].
[116] *See* FTC v. AbbVie, Inc., No. 14-cv-5151, 2017 WL 4098688, at *11–12 (E.D. Pa. Sept. 15, 2017).

by the Third Circuit, refused to dismiss the FTC's claim that AbbVie and its partner Besins engaged in sham litigation on its testosterone gel, AndroGel.[117]

Even more, the FTC obtained a near-unprecedented summary judgment on the ground that the suit was objectively baseless. The district court held that "[t]he patent lawsuits against [the generics] were without question objectively baseless" as the patent holders "could not realistically have expected success on the merits of this issue or have had a reasonable belief that they had a chance to prevail."[118] Similarly, the Third Circuit explained that "[n]o reasonable litigant in AbbVie and Besins's position would believe it had a chance of winning on these arguments."[119]

On the subjective prong, after holding a trial, the district court found that the only reason that AbbVie's "very experienced patent attorneys"[120] filed lawsuits "was to impose expense and delay" on the generic firms "to block their entry into the . . . market with lower price generics and to delay defendants' impending loss of hundreds of millions of dollars in AndroGel sales and profits."[121] The Third Circuit concluded that the lower court "did not err in concluding [that] AbbVie and Besins's suit against Perrigo concealed an attempt to interfere directly with its business relationships, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."[122]

3. Patent Thicket

In addition to suffering one of the few losses in a sham litigation case in the modern era, AbbVie has received significant criticism for its "patent thicket," a collection of more than 130 patents covering Humira, the best-selling U.S. drug, which treats rheumatoid arthritis, Crohn's disease, and psoriasis.[123] Indirect purchasers sued, claiming that AbbVie created a patent thicket "so dense that it prevented would-be challengers from entering the market with cheaper biosimilar alternatives."[124] More than 90% of the

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[117] *See id.*
[118] *Id.* at *11.
[119] FTC v. AbbVie Inc., 976 F.3d 327, 366 (3d Cir. 2020).
[120] Findings of Fact and Conclusions of Law at 52, FTC v. AbbVie Inc., No. 14-cv-5151 (E.D. Pa. June 29, 2018).
[121] *Id.* at 53.
[122] *AbbVie*, 976 F.3d at 371.
[123] *In re* Humira (Adalimumab) Antitrust Litig., 465 F. Supp. 3d 811, 820, 822 (N.D. Ill. 2020).
[124] *Id.* at 820.

Humira patents "were issued in 2014 or later, despite the fact that [the drug] was first marketed in 2002."[125]

The plaintiffs alleged that AbbVie "gummed up progress toward lower prices by obtaining and asserting 'swaths of invalid, unenforceable, or noninfringed patents without regard to the patents' merits.'"[126] In particular, the plaintiffs alleged:

> By repeatedly and aggressively asserting this patent thicket during a lengthy, detailed regulatory process (and subsequent infringement litigation), AbbVie was able to delay its competitors and avoid any real examination of the patents' validity long enough to reap a few more years' worth of monopoly profit on its lucrative, patent-protected product[.][127]

The district court dismissed the plaintiffs' sham litigation claim based on the percentage of patent applications granted, AbbVie's success rate during a Patent Office administrative process, the regulatory regime, and the existence of settlements requiring concessions from both sides.[128] But as one of us has explained,[129] this analysis raises many questions, as (1) courts have relied on the percentage of cases upheld in *court*, not in the more lenient settings of patent applications or patent office proceedings; (2) the regulatory regime provides no basis for immunizing baseless infringement allegations; and (3) sham litigation cannot be justified based on a settlement that benefits both sides (at the expense of consumers).[130]

In affirming the district court, the U.S. Court of Appeals for the Seventh Court applied reasoning that is just as questionable, assuming that antitrust had no role to play within the scope of the patent and that a plaintiff must prove that every patent held by the brand company is "invalid or inapplicable."[131] But Supreme Court precedent makes clear that "patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by

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[125] *Id.* at 822.
[126] *Id.* at 827.
[127] *Id.*
[128] *See id.* at 829–33.
[129] *See* Michael A. Carrier, *The U.S. District Court for the Northern District of Illinois Dismisses Antitrust Case Challenging Patent Thicket (Humira)*, E-COMPETITIONS 7 (Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678198 [https://perma.cc/B9EC-BWBS].
[130] *See id.* at 5–6; *see also* HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE & MICHAEL A. CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 15.03[A][2][c], at 15-42.4-9 to 15-42.4-10 (3d ed. Supp. 2021).
[131] Mayor of Baltimore v. AbbVie Inc., 42 F.4th 709, 712–13 (7th Cir. 2022).

a patent" and that the "relevant anticompetitive harm" is preventing the "risk of competition," even when there is "a small risk of invalidity" (in other words, the patent is most likely valid).[132]

In reality, and as the district court acknowledged,[133] the plaintiffs *did* offer evidence of sham litigation. In particular, "AbbVie allegedly asserted without basis that if Amgen launched its biosimilar, it would infringe no less than sixty-six of AbbVie's patents," but "[w]hen Amgen disagreed, AbbVie failed to address Amgen's concerns and declined to elaborate (even after Amgen repeatedly notified AbbVie of its failures to respond)."[134] In addition, "[d]uring AbbVie's prelitigation exchanges with Sandoz, AbbVie listed nine formulation patents that specified the use of a buffer system with ingredients that were in neither Sandoz's biosimilar nor Humira—i.e., that were objectively baseless to assert," and AbbVie "listed patents that were not infringed or that had been invalidated during . . . patent [litigation] with Boehringer."[135]

In addition to this evidence of sham litigation, there was evidence of anticompetitive settlements. The plaintiffs alleged that AbbVie entered into settlements by which potential competitors received early entry dates in Europe "to delay their U.S. market entry."[136] The district court granted AbbVie's motion to dismiss, finding that the settlements did "not involve a cash payment" and that the "global patent settlements . . . provided one early entry date for the European market and a different early entry date for the U.S. market—both permissible under *Actavis*."[137] The appellate court similarly treated the U.S. and European settlements as entirely separate, stating that "0 + 0 = 0" and that the settlements "are traditional resolutions of patent litigation."[138]

This analysis, however, contravenes *Actavis*, as courts have made clear that payment can—and typically does—take forms other than cash.[139] In fact, the district court acknowledged that "[t]he package deals conferred large European revenue streams (hundreds of millions of dollars) onto the biosimilar companies, while buying AbbVie even more lucrative monopoly time in the U.S. (worth billions of dollars in revenue for AbbVie)."[140] And it

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[132] FTC v. Actavis, 570 U.S. 136, 148, 157 (2013).
[133] *In re* Humira (Adalimumab) Antitrust Litig., 465 F. Supp. 3d 811, 832 (N.D. Ill. 2020) (acknowledging that "it remains plausible that at least some of the assertions AbbVie made . . . were objectively baseless").
[134] *Id.*
[135] *Id.*
[136] *Id.* at 825.
[137] *Id.* at 836, 840.
[138] Mayor of Baltimore v. AbbVie Inc., 42 F.4th 709, 715–16 (7th Cir. 2022).
[139] HOVENKAMP ET AL, *supra* note 130, § 16.01[D], at 16-39 to 16-41.
[140] *Humira*, 465 F. Supp. 3d at 840 (citations omitted).

recognized that "[t]he settlement terms, when taken together, involve transfers of value from the patentee to the alleged infringer."[141] In other words, at least based on the plaintiffs' allegations, this was a settlement involving payment.

B. ALLERGAN

In addition to AbbVie's anticompetitive toolkit of pay-for-delay settlements, sham litigation, and patent thickets, Allergan offered two additional types of conduct: sham citizen petitions and a questionable attempt to exploit tribal immunity.[142]

1. Sham Citizen Petitions

First were citizen petitions. This conduct is designed to raise legitimate safety and effectiveness concerns with the FDA. But as one of us has shown, nearly all petitions are filed by brand firms and the FDA denies more than 90% of them.[143]

Allergan provides an example of this behavior. The court in *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation* refused to dismiss an antitrust challenge based on three sham citizen petitions.[144] The court found that it was "easily established that Allergan's subjective intent in filing citizen petitions was to frustrate generic competition" on its dry eye medicine Restasis.[145] This finding was based on the plaintiffs' allegations that

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[141] *Id.* at 842.

[142] In addition to the conduct discussed in this Part, Warner Chilcott engaged in product hopping on colitis-treating Asacol and acne-treating Doryx. *See In re* Asacol Antitrust Litig., 233 F. Supp. 3d 247 (D. Mass. 2017); Mylan Pharms. Inc. v. Warner Chilcott Pub. Co., 838 F.3d 421, 426 (3d Cir. 2016). Warner Chilcott was acquired by Actavis in 2013, and Allergan was acquired by Actavis in 2015. *See* Press Release, Actavis, Actavis Completes Warner Chilcott Acquisition (Oct. 1, 2023, 7:05 AM) (available at https://www.prnewswire.com/news-releases/actavis-completes-warner-chilcott-acquisition-225944231.html [https://perma.cc/J8YG-X9PX]); Press Release, Actavis, Actavis Completes Allergan Acquisition (Mar. 17, 2015, 8:55 AM) (available at https://www.prnewswire.com/news-releases/actavis-completes-allergan-acquisition-300051633.html [https://perma.cc/Y5MK-MMUS]).

[143] *See* Michael A. Carrier & Carl Minniti, *Citizen Petitions: Long, Late-Filed, and At-Last Denied*, 66 AM. U. L. REV. 305, 308 (2016) (explaining that figures refer to "505(q) petitions, which [request that] the FDA . . . take specific action against a pending generic drug").

[144] 333 F. Supp. 3d 135, 141, 154–56 (E.D.N.Y. 2018).

[145] *Id.* at 154.

"Allergan chose not to appeal any of the denials of its petitions to a federal court, knowing that it was unlikely to win an appeal and preferring instead to file successive petitions because that would be more disruptive to the FDA approval process."[146]

The court also found that the plaintiffs' allegations of objective baselessness were plausible. The reason is that "[t]he FDA denied every substantive request made by Allergan in each of its three petitions," with "Allergan repeatedly request[ing] that the FDA do away with *in vitro* testing for bioequivalency for Restasis®, and the agency emphatically reject[ing] this request each time it was made."[147] In particular, "Allergan's second and third citizen petitions largely rehash[ed] the claims of the first and were denied on the same grounds."[148] In denying the second petition, the FDA "stated that Allergan had 'repeat[ed] many of the assertions' from the first petition, that its data were 'misleading' and 'insufficient,' and that its arguments 'lack[ed] legal support' and 'rest[ed] on flawed logic.'"[149] And "[i]n response to the third petition, the FDA stated that, because it had 'addressed [Allergan's] assertions in its responses to the previous citizen petitions, it does not address them again here.'"[150]

2. Tribal Immunity

Allergan received even more attention for a brazen attempt to use tribal immunity to avoid administrative review of its patents. As a result of the America Invents Act, Congress created mechanisms to review patents at the Patent Office.[151] One of those is known as "*inter partes* review."[152] Such a proceeding was designed to provide a "second look" at an earlier grant of a patent and "improve patent quality."[153]

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[146] *Id.*
[147] *Id.* at 156.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 6, 125 Stat. 299 (2011).
[152] *Inter partes* review provides a means to challenge patent claims before the Patent Trial and Appeal Board on the grounds that the patent is not novel or nonobvious. *See Inter Partes Review*, U.S. PAT. & TRADEMARK OFF. (May 9, 2017, 10:15 AM), https://www.uspto.gov/patents/ptab/trials/inter-partes-review [https://perma.cc/9Z3E-S2QW].
[153] Saint Regis Mohawk Tribe v. Mylan Pharms. Inc., 896 F.3d 1322, 1334 (Fed. Cir. 2018) (Dyk, J., concurring) (internal quotation marks omitted).

Allergan claimed that this was "a 'flawed' review system that amounts to 'double jeopardy.'"[154] It sought to avoid this review by transferring patents to the Saint Regis Mohawk Tribe to exploit tribal sovereign immunity.[155] The maneuver failed, as the Federal Circuit found that *inter partes* review was "more like an agency enforcement action than a civil suit brought by a private party" and thus that "tribal immunity is not implicated."[156]

Adding insult to injury, a district court (in a decision later upheld) found that the alleged infringers "proved by clear and convincing evidence that the asserted claims of the Restasis patents are invalid for obviousness."[157] And the court found that "the force of th[e] evidence" favoring nonobviousness "is considerably blunted by the fact that, based on protection from a succession of patents, Allergan was able to foreclose competition . . . from the early 1990s until 2014," with "the issuance of the Restasis patents . . . barr[ing] any direct competition for Restasis since then."[158]

In a setting in which many generic-delaying activities of brand firms have been criticized, this takes a back seat to none.[159] As one example of the criticism, several Senators wrote that "[i]t is difficult to conceive of Allergan's transaction as anything other than a sham to subvert the existing intellectual property system."[160] They continued: "Put simply, Allergan paid another entity to take possession of its property, and then guaranteed annual payments for doing no more than holding the property and asserting a special legal standing to quash all disputes related to said property."[161]

Despite this vast array of anticompetitive conduct, in 2020, the FTC cleared the merger of AbbVie and Allergan. We believe that the agency should have more directly considered the impact that prior bad acts would have on the likelihood of future antitrust violations.

Applying our framework, the three factors we propose for prior unilateral bad acts suggest either blocking the merger or imposing behavioral

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[154] Eric Sagonowsky, *Allergan Was Blasted for its Unusual Mohawk Patent License, and Now It's a Total Flop*, FIERCEPHARMA (Feb. 26, 2018, 11:10 AM), https://www.fiercepharma.com/legal/allergan-s-controversial-tribal-licensing-pact-falls-short-ptab-scrutiny [https://perma.cc/K7XF-CTCF].

[155] *See Saint Regis Mohawk Tribe*, 896 F.3d at 1325.

[156] *Id.* at 1327.

[157] Allergan, Inc. v. Teva Pharms. USA, Inc., No. 15-cv-1455, 2017 WL 4803941, at *65 (E.D. Tex. Oct. 16, 2017), *aff'd*, 742 F. App'x 511 (Fed. Cir. 2018).

[158] *Id.*

[159] *See* Meg Tirrell, *Allergan Responds to Mounting Criticism of Mohawk Patent Deal*, CNBC (Oct. 3, 2017, 9:45 AM), https://www.cnbc.com/2017/10/03/allergan-responds-to-mounting-criticism-of-mohawk-patent-deal.html [https://perma.cc/9T2Y-TY2V].

[160] *See* Meg Tirrell, *Senators Question Allergan CEO on Tribe Patent Deal*, CNBC (Nov. 7, 2017, 3:11 PM), https://www.cnbc.com/2017/11/07/senators-question-allergan-ceo-on-tribe-patent-deal.html [https://perma.cc/7B96-XSB7].

[161] *Id.*

remedies.[162] First, AbbVie and Allergan operated in markets similar to the one in which the merged company was anticipated to operate. Second, the prior bad acts offer straightforward examples of conduct that would be relevant in the markets covered by the merged entity. And third, the level of proof of prior bad acts is quite high. Even though the plaintiffs lost their challenge to AbbVie's Humira patent thicket, the Third Circuit reinstated the FTC's pay-for-delay settlements case and the agency entered into agreements prohibiting the parties from engaging in future pay-for-delay settlements. Even more compelling, AbbVie's sham litigation is one of the few cases in the modern era in which the plaintiff won at the summary judgment stage on the issue of objective baselessness and after trial on subjective baselessness.[163] In addition, Allergan's repetitive citizen petitions were rejected in language that was strong for the FDA,[164] and its tribal immunity maneuver was roundly criticized.[165]

VI. REMEDIES

Where the threatened harms from a merger are severe and the merger results in only two or three firms in the market,[166] the agencies often sue to block the transaction. Examples include *United States v. Dean Foods*,[167] a "3 to 2" merger (or a merger to monopoly, depending on the market), and the FTC's administrative complaint challenging the merger of Lifespan and Care New England, the two largest healthcare providers in Rhode Island, with a combined market share of at least 70%.[168] But in close calls where the outcome of a challenge is less obvious (such as mergers resulting in three

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[162] For a discussion of potential relief, see *infra* Part VI.
[163] *See supra* notes 118–122 and accompanying text.
[164] *See supra* Section V.B.1.
[165] *See supra* Section V.B.2.
[166] *See* Nicholas Hill & Keith Waehrer, *Is 5-to-4 the New 4-to-3? A View from the United States*, BATES WHITE (Aug. 6, 2019), https://www.bateswhite.com/media/publication/180_Hill_and_Waehrer_2019_Is_5-to-4_the_new%20_4-to-3.pdf [https://perma.cc/9PX9-PSS9].
[167] Complaint at 3, United States v. Dean Foods Co., 2010 WL 3980185 (E.D. Wis. Oct. 8, 2010) (No. 10-cv-0059) (noting that in the fluid milk market, the merging firms "have been the only two bidders for some contracts and two of only three bidders for other contracts"). AAG Cooley represented the State of Wisconsin in this matter.
[168] Complaint at 2, *In re* Lifespan Corp./CNE, No. 9406 (F.T.C. Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/d_9406_lifespan-cne_p3_complaint_public_redacted.pdf [https://perma.cc/7SM8-P8CX]; *see also id.* at ¶ 1 (explaining that the firms' inpatient hospitals "overlap significantly in the medical, surgical, and diagnostic services they offer that require an overnight hospital stay" and that they "operate the only two standalone inpatient behavioral health facilities" in the state).

firms left in the market,[169] as well as those leaving four or five firms[170]), a focus on bad acts could provide a tailored remedy that offers a "third way" between a lawsuit to block the merger and letting it proceed subject to divestitures.[171]

A. THE NEED FOR TAILORED REMEDIES

The agencies do not sue to enjoin every merger that threatens substantial anticompetitive effects. One reason is that they do not have the resources to bring every case they could. Another is that the parties to a merger may acknowledge the transaction's potential competitive effects and come to the table with proposed divestitures. Where the agencies elect not to sue to block the merger, they tend to employ other relief, including behavioral remedies.[172]

These remedies "entail[] [injunctive] provisions" that would, in effect, manage or regulate "the merged firm's post-consummation business conduct."[173] Some have criticized behavioral remedies for "supplant[ing] competition with regulation,"[174] "requir[ing] a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives,"[175] and

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[169] *See, e.g.*, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 193 (S.D.N.Y. 2020) (discussing merger between T-Mobile and Sprint, which would—together with Verizon and AT&T—create a market of three large firms).

[170] *See, e.g., The Proposed United-Continental Merger: Potential Effects for Consumers and Industry*: *Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. and Infrastructure*, 111th Cong. 1–2 (2010) (statement of Rep. Jerry F. Costello, Chairman, Subcommittee on Aviation) (discussing merger in airline industry between United and Continental, which would—together with Delta, American, and US Air—leave "only four legacy airlines").

[171] *See* Danzon & Carrier, *supra* note 19, at 516–17 (suggesting nuanced, case-specific analysis for mergers between midsize drug firms).

[172] *See* DOJ, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 6 (2011) [hereinafter ANTITRUST DIV. POLICY GUIDE], https://www.justice.gov/atr/page/file/1098656/download [https://perma.cc/54QK-96NW]. In addition to behavioral remedies, the agencies also have used structural remedies, which "involve the sale of physical assets" or require the merged firm to "create new competitors through the sale or licensing of intellectual property rights." *Id.*

[173] *See id.*

[174] Makan Delrahim, Assistant Att'y Gen., DOJ, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar [https://perma.cc/6CM7-229N].

[175] John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, AM. ANTITRUST INST. 5 (Nov. 3, 2011),

necessitating "close and ongoing oversight . . . , typically relying upon a monitor with authority to require reports and perhaps to intervene in the decision-making of the merged firm."[176]

B. BEHAVIORAL-REMEDY CHALLENGES

The usual behavioral remedies include firewall provisions "prevent[ing] the dissemination of information within a firm," fair-dealing provisions taking the form of "equal access, equal efforts, and equal terms," and transparency provisions, "mak[ing] certain information available to a regulatory authority that the firm otherwise would not be required to provide."[177] John Kwoka and Diana Moss, in analyzing the problems created by the behavioral remedies imposed in the Ticketmaster–Live Nation, Comcast–NBC Universal (NBCU), and Google–ITA Software (ITA) consent orders,[178] have highlighted three challenges.

First, they have observed that "prohibitions on retaliation against competitors" such as those in the Ticketmaster and NBCU orders require the agency to "disentangl[e] the firm's motives for a specific action . . . to determine whether it is properly characterized as 'retaliatory.'"[179] This determination is difficult because of multiple explanations for a firm's conduct and because "[t]he agency is at an obvious and inherent informational disadvantage relative to the firm in making that determination."[180] Second, consent orders often take place "in the face of possible complexity of the product, the transaction, the relationship to rivals, and uncertainty about the future," which increases the consent order's

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https://www.antitrustinstitute.org/wp-content/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf [https://perma.cc/ZC8X-VKST].

[176] *Id.* at 6.

[177] ANTITRUST DIV. POLICY GUIDE, *supra* note 172, at 13, 14–15, 16. For a discussion of how behavioral remedies have been treated differently in horizontal and vertical mergers, see Kwoka & Moss, *supra* note 175, at 8 (tracing DOJ's evolving use of behavioral remedies).

[178] Kwoka & Moss, *supra* note 175, at 14–22. In early 2009, Ticketmaster was "the leading company in artist management and dominant seller of tickets to live music events across the country," and Live Nation was "the leading concert promoter." *Id.* at 14. In late 2009, Comcast, with its "cable and regional sports networks and digital media properties," and NBCU, with its "cable networks, filmed and televised entertainment, and theme parks," agreed to pool assets in a $30 billion joint venture. *Id.* at 16–17. In mid-2010, leading search engine Google proposed to acquire ITA, which "licensed a leading software product that allowed travel websites to furnish consumers with complex and customized flight search functionality." *Id.* at 19.

[179] *Id.* at 23–24.

[180] *Id.* at 24.

complexity, as shown by the Google–ITA decree.[181] And third, highlighting "information firewalls in Google-ITA and Comcast-NBCU" and nondiscrimination provisions in Ticketmaster–Live Nation, Kwoka and Moss explain that consent orders "cannot abolish the merged firm's incentive to maximize profit," which leads to the firm "persistently confront[ing] opportunities to use information, develop business practices, or interact with competitors in ways that would increase its profits but that are prohibited by the consent order."[182]

In contrast to all of these challenges, the bad acts that are the subject of behavioral remedies in the pharmaceutical industry are not as fine-grained and intrusive. Even though the examples we discuss have arisen outside the merger context, the remedies still would be appropriate in that setting. As discussed immediately below, those remedies typically involve, for a period of time, prohibitions on conduct like pay-for-delay settlements and notifications on behavior relating to product hopping and citizen petitions.

C. BEHAVIORAL REMEDIES IN PRACTICE

One example of a behavioral remedy the FTC has employed in the pharmaceutical industry is provided by the agency's lawsuit against Cephalon (and parent company Teva) for entering into "a series of unlawful pay-for-delay patent settlements" that involved paying more than $300 million to four generic firms to delay entering the market with a version of sleep-disorder drug Provigil.[183] On the eve of trial, the case settled, with Cephalon and Teva paying $1.2 billion to compensate purchasers.[184] The settlement included behavioral remedies that prohibited Teva from entering into "business transactions contemporaneous with" patent settlements "designed to compensate the generic firm for its agreement to delay, or refrain from, competing."[185] In particular, the order banned "agreements in which the branded drug manufacturer makes a monetary payment or otherwise compensates the settling generic and (1) makes that transfer of value

[181] *See id.* at 25.
[182] *Id.* at 26.
[183] Public Statement, FTC, Statement of the Federal Trade Commission, FTC v. Cephalon, Inc. 1–2 (May 28, 2015), https://www.ftc.gov/system/files/documents/public_statements/645491/150528cephalonstatement.pdf [https://perma.cc/MV7F-XZQW].
[184] *Id.* at 1.
[185] *Id.* at 2.

expressly contingent on settlement of existing patent litigation, or (2) the transfer occurs 30 days before or after the patent settlement."[186]

In a second example, the FTC sued RB Group, together with former subsidiary Reckitt Benckiser (now known as Indivior), alleging delayed generic competition on opioid replacement therapy Suboxone.[187] The FTC claimed that the defendants switched the market from tablets to film based on "false and misleading claims" that the film "was less susceptible to accidental pediatric exposure."[188] The FTC also alleged that the defendants submitted a citizen petition to the FDA "fraudulently claiming that Suboxone Tablets had been discontinued due to safety concerns about the tablet formulation of the drug."[189]

In a consent decree, the FTC required the defendant to provide notification within thirty days of filing a new drug application for a "Follow-on Drug Product"[190] and to file a second notification (with the timing linked to FDA approval) with information including "pricing plans," "forecasted sales," "[t]ranscripts of . . . investor calls during the prior twelve months that discuss the Follow-on Drug Product," "[a] statement of all claimed benefits of the Follow-on Drug Product compared to the Original Drug Product," and "[a] statement of whether [the] Defendant intends to materially alter the terms on which it sells the Original Drug Product," together with the "reasons for materially altering them."[191] The order also prohibited the defendant (or a licensee) from taking actions against generics that include "[d]estroying inventory or withdrawing from the market any strength or formulation" of the original product, "[f]ailing to fill orders" for the original product "on the same terms and conditions . . . within the same time frame and with the same convenience" as orders for the follow-on product, offering a price for the original drug that is higher than the price of the follow-on product,[192] and

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[186] *Id.* at 3. For a later settlement involving Teva, see Press Release, FTC, FTC Enters Global Settlement to Resolve Reverse-Payment Charges Against Teva (Feb. 19, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/02/ftc-enters-global-settlement-resolve-reverse-payment-charges-against-teva [https://perma.cc/M9Y6-YXL7].

[187] *See* Complaint at 1, FTC v. Reckitt Benckiser Grp. PLC, No. 19-cv-028 (W.D. Va. 2019). AAG Cooley is lead counsel for 42 states on a similar case alleging that Indivior attempted to thwart generic competition.

[188] *Id.* at 2.

[189] *Id.*

[190] The order defined such a product in terms of characteristics like having "the same . . . active ingredient," treating "the same condition," and "target[ing] the same patient population" as the original drug. *See* [Proposed] Stipulated Order for Permanent Injunction and Equitable Monetary Relief at 5, FTC v. Reckitt Benckiser Grp. PLC, No. 19-cv-028 (W.D. Va. 2019).

[191] *Id.* at 7–8.

[192] *Id.* at 8–9. The price is defined as the "net price paid by a payor . . . taking into account all discounts, refunds, reimbursements, and rebates." *Id.* at 5.

deleting the "National Drug Code . . . from the National Drug Data file."[193] Finally, the order required the defendants, upon filing a citizen petition, to "simultaneously disclose to both the FDA and the [FTC] . . . [a]ll studies and data" on which the petition relies as well as such information within the defendant's knowledge or possession that "address[es] the validity or strength of one or more of the material contentions" in the petition.[194]

The behavioral remedies in the Teva and RB consent decrees do not threaten the complexity and monitoring issues presented by the Ticketmaster, NBCU, and ITA orders. They apply to specific conduct and do not require courts to wade into complex issues of firewalls, transparency, or fair-dealing provisions involving nondiscrimination. In addition, our requirements for prior unilateral bad acts of market similarity, a connection between the prior bad acts and the markets covered by the merger, and a high level of proof of the prior bad acts increases the likelihood that the combined company will have the ability and incentive to engage in similar anticompetitive conduct in the future. Similarly, the occurrence of prior collusion in the same market recognized in the Guidelines forges the link between past and future conduct.

In short, the agencies can address previous anticompetitive conduct without enjoining the merger by using clean, easily understood behavioral remedies like those in the FTC's decrees.[195] Of course, in certain cases, blocking the merger is appropriate. But behavioral remedies like those discussed in this Section offer a middle ground between blocking the merger and letting it proceed without conditions.[196]

CONCLUSION

In assessing the predicted effects of mergers, the antitrust agencies and the courts should seriously consider prior bad acts. Such conduct is likely to affect the combined company's ability and incentive to engage in future anticompetitive conduct and is particularly vital to consider in close cases, such as where the market will be moderately concentrated post-merger. We believe that a reminder of prior collusion's salience is beneficial. And, based on our three-factor framework, we urge closer attention in merger review to previous unilateral behavior. In conclusion, given the challenges and

[193] *Id.* at 9.
[194] *Id.* at 6–7.
[195] We offer these remedies as an illustrative, not exclusive, list.
[196] We anticipate that such behavioral remedies would serve as a middle ground in a case in which a merger challenge is appropriate. We do not support using the remedies as an end-run around the agencies' inability to challenge the conduct outside the merger setting.

criticisms of merger analysis today, we believe that a more sustained focus on prior bad acts would be beneficial.