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Litigation

Airlines, Food and Drug Stores Most Active in Antitrust Cases

Large food and drug store chains and major airlines appear in court more often for antitrust cases as a proportion of their total litigation than any other industry, according to a Bloomberg BNA analysis of district court cases in the last five years.

More than one out of 10 of the biggest food and drug stores' district court appearances are in antitrust-related litigation, in part because large chains like Walgreens Boots Alliance Inc. and The Kroger Co. are involved in several cases suing drug makers over the availability of generic drugs.

Almost 20 percent of court appearances among the three largest airlines — American Airlines Group, United Continental Airlines, and Delta Airlines Inc. — are antitrust-related.

The percentage of antitrust court appearances in airlines and food and drugstore chains is notably higher than in most other industry sectors, where the percentage of antitrust court appearances hovers around 1 percent to 2 percent.

Food and drug store chains are more likely to be in federal court as antitrust plaintiffs, reflecting several ongoing lawsuits against pharmaceutical companies, while the biggest airlines are almost always defendants of antitrust claims. The health care and media sectors have a far smaller portion of their litigation activity related to antitrust, even though those firms are active in mergers and often accused of consolidation, Bloomberg BNA's analysis shows.

Antitrust analysts say it makes sense that industries with several big companies dominating the market would be more involved in antitrust litigation. "When you have a very consolidated industry, like we do in airlines, like we do in segments of the food supply chain, there are going to be concerns about anti-competitive behavior," American Antitrust Institute President Diana Moss told Bloomberg BNA.

The Bloomberg BNA analysis relied on Bloomberg Law's Litigation Analytics — which tracks companies, law firms, and judges in district court cases — to tally court appearances from the top five companies in each of Fortune 500's 21 industry sectors. Bloomberg BNA analyzed the percentage of each company's appearances in antitrust-related cases out of total court appearances over the last five years.

Broadly, antitrust litigation activity is fairly low across all sectors, but it is higher in sectors where mul-

iple large companies influence the market. "Because those industries have changed so markedly in the last 10 years through consolidation, that has created this pretty deep platform for ongoing concerns about how firms conduct themselves," said Moss.

Food and Drug Stores The five biggest food and drug chains often show up as plaintiffs in the same cases against drug companies, although they are rarely sued on antitrust grounds.

Walgreens shows up as a named defendant in only two of 87 appearances in antitrust-related cases, according to Litigation Analytics. Albertsons Cos. Inc. is a named defendant in only one appearance among 73 antitrust cases it participated in.

Roseann Termini, a professor at the Widener University School of Law, told Bloomberg BNA that the Federal Trade Commission takes "seriously" instances where drug manufacturers try to extend their patent dominance by buying off potential generic competitors. The costs of those drugs directly affects the stores.

Termini said she expects to see more antitrust litigation around authorized generics, a type of prescription drug that is produced by a brand-name company and marketed under a private label at generic prices.

Big antitrust cases can lead to multiple appearances in court. Almost one-fourth of Publix Supermarkets' total litigation appearances (24.7 percent) are antitrust-related. Virtually all of those appearances come from the company's participation as a plaintiff in a few major cases — one alleging collusion in the packaged seafood business (which is also an ongoing Justice Department investigation) and another alleging anticompetitive behavior among chocolate makers.

Sharon Robertson, an antitrust practitioner at Cohen Milstein Sellers & Toll, said there are several reasons that food and drug stores often act together as antitrust plaintiffs. The market is dominated by a small number of big players, which makes it easier for companies to work with each other. Their products also aren't particularly flexible in terms of price or choice. People use them every day and can't or won't switch to different products.

"There is both the motive and opportunity for collusion because of the way that the industry is structured," she told Bloomberg BNA.

AIA's Moss said the companies coordinate with one another to attack a common enemy. "A lot of retail consolidation in grocers and drug stores is what I call 'reactive consolidation.' It's designed as a way to push back against consolidation elsewhere in the supply chain."

Airlines In contrast to the food and drug store sector, airlines are almost without exception the defendants in antitrust district court cases. American Airlines shows up as a plaintiff only twice out of 143 appearances in antitrust litigation — once in a lawsuit against Visa Inc. and Mastercard Inc. and once in a related class action against the two credit card companies. Delta is a defendant in every antitrust-related appearance, many of which also name American and United Airlines in the suits.

(Bloomberg BNA included United Parcel Service and FedEx Corp. in its analysis because they are in Fortune's top five transportation companies, but they have less than 2 percent of court appearances that are antitrust-related.)

The airline industry also has seen five big mergers in the last 10 years, which has led to "massive" consolidation in the domestic market, according to Moss.

As of 2016, the top four U.S. airlines — American, United, Delta, and Southwest Airlines Co. — held almost 85 percent of the market share, as opposed to the average 65 percent share held in the past. (Southwest is No. 6 on Fortune's top transportation companies, and as such wasn't included in Bloomberg BNA's analysis.)

When asked about competition in the airline industry, an executive from the trade association Airlines for America told Bloomberg BNA that robust competition "has contributed to improvements in overall customer satisfaction."

Antitrust Droughts Media and health care companies are frequently accused of consolidation and market dominance, but they aren't necessarily active in court on antitrust issues. The actual percentage of court appearances in antitrust litigation out of all district court appearances is below 4 percent for the top firms in the media and below 10 percent for those in the health care sector, according to Bloomberg BNA's analysis.

In addition to media and health care, several sectors have very low percentages of antitrust cases, such as apparel, aerospace and defense, engineering, and hospitality (i.e., hotels, restaurants, and leisure). All of the top five companies in the aerospace and defense sector have seen no antitrust-related district court appearances over the last five years.

Some industries have less antitrust litigation because they sell non-commodity products that are less likely to lead to coordination among big players, according to Robertson. They compete based on the differences in their products, not price or volume.

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