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This Article surveys substantive antitrust decisions issued between January 1, 2013 and December 31, 2013, by the United States Supreme Court for cases that originated in the Eleventh Circuit, by the United States Court of Appeals for the Eleventh Circuit, and by the United States district courts within the Eleventh Circuit.

I. UNITED STATES SUPREME COURT DECISIONS

During 2013, the United States Supreme Court decided two important antitrust cases that originated in the Eleventh Circuit. In *FTC v. Phoebe Putney Health System, Inc.*,[1] the Court clarified the state-action doctrine.[2] In the second case, *FTC v. Actavis, Inc.*,[3] the Court addressed the controversial issue of "reverse-payment settlements" between brand-name drug manufacturers and generic drug manufacturers, and held that, at least in that particular case, such a settlement may harm competition.[4]

The Supreme Court's decision in *Phoebe Putney* is significant for its clarification of the extent to which a broad, general state statute can immunize anticompetitive conduct. The case began when the FTC filed a complaint to stop Phoebe Putney Memorial Hospital and its related entities (collectively, Phoebe Putney), as well as the Hospital Authority of Albany-Dougherty County (Hospital Authority), from acquiring

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1. 133 S. Ct. 1003 (2013).
2. *Id.* at 1016-17.
3. 133 S. Ct. 2223 (2013).
4. *Id.* at 2234.

Palmyra Park Hospital, Inc. (Palmyra), the only other general acute-care hospital in a six-county area and Phoebe Putney's main competitor.[5] The FTC alleged that the acquisition would create "a virtual monopoly for inpatient general acute care services sold to commercial health plans and their customers in Albany, Georgia and its surrounding area."[6] But the United States District Court for the Middle District of Georgia denied the FTC's effort to enjoin the transaction, holding that because the Hospital Authority owned Phoebe Putney, the acquisition was protected from antitrust scrutiny by the state-action doctrine.[7] The United States Court of Appeals for the Eleventh Circuit affirmed, although it also stated that "[w]e agree with the Commission that, on the facts alleged, the joint operation of [Phoebe Putney Memorial Hospital] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly."[8]

The Supreme Court reversed the Eleventh Circuit's decision and held that the state-action doctrine did not immunize Phoebe Putney's acquisition of Palmyra from antitrust scrutiny.[9] Specifically, the Court held that there was no clearly articulated state policy authorizing conduct such as Phoebe Putney's acquisition of the only other general, acute-care hospital in the region, and that Georgia's grant of power to state hospital authorities to acquire other hospitals was no different from similar powers granted to all corporations.[10] As such, the granting of that power did not give the Hospital Authority, or Phoebe Putney, carte blanche to act in a manner that harmed competition.[11] Thus, the Court reversed the Eleventh Circuit's decision denying the FTC's request for an injunction on state-action immunity grounds.[12]

After the Supreme Court's decision, the FTC renewed its administrative proceeding against Phoebe Putney and the Hospital Authority and its suit for injunctive relief pending the outcome of that administrative proceeding. By that time, Phoebe Putney had already completed its acquisition of Palmyra, and the Georgia Department of Community Health had already granted Phoebe Putney a single operating license for both hospitals. The District Court for the Middle District of Georgia granted the FTC's motion for a temporary restraining order to prevent

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5. *Phoebe Putney*, 133 S. Ct. at 1008.

6. Phoebe Putney Health Sys., Inc., 2011 F.T.C. LEXIS 64, at *2 (Apr. 19, 2011).

7. *Phoebe Putney*, 133 S. Ct. at 1008-09; *see also* FTC v. Phoebe Putney Health Sys., Inc., 793 F. Supp. 2d 1356, 1381 (M.D. Ga. 2011).

8. FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369, 1375 (11th Cir. 2011).

9. *Phoebe Putney*, 133 S. Ct. at 1017.

10. *Id.* at 1011-12, 1015.

11. *Id.* at 1012.

12. *Id.* at 1017.

the two hospitals from any further integration and to prohibit them from increasing prices for any contracts already in place, thus maintaining the "status quo" while the FTC's administrative process was moving forward. The court subsequently granted a preliminary injunction for the same purpose.[13] In the end, the FTC entered into a settlement agreement with Phoebe Putney and the other defendants that left Phoebe Putney in control of both hospitals.[14]

In *FTC v. Actavis, Inc.*,[15] the Supreme Court held that the FTC's lawsuit challenging a reverse-payment settlement should have been allowed to proceed.[16] Reverse-payment settlements are simply settlements that resolve patent infringement lawsuits relating to pharmaceuticals and their generic challengers.[17] Specifically, when a generic drug manufacturer seeks FDA approval for a new drug that does the same thing as a brand-name drug already on the market, the generic drug manufacturer frequently assures the FDA that its drug will not infringe the brand-name drug's patents, or claims that those patents are invalid.[18] Invariably, that claim results in the brand-name drug manufacturer suing the generic drug manufacturer for patent infringement.[19] In many instances, such cases are settled when the brand-name drug manufacturer agrees to pay the generic drug manufacturer millions of dollars to delay the generic drug's entry into the market.[20] Such settlements are referred to as "reverse payments" because the plaintiff patent-holder pays the defendant, who presumably had no claim for damages in the first place.[21]

In this particular case, the FTC sued the brand-name drug manufacturer and several generic drug manufacturers, all of whom had entered into a settlement agreement in 2006. The settlement involved the brand-name drug manufacturer paying the generic drug manufacturers hundreds of millions of dollars and the generic drug manufacturers agreeing not to bring their products to market until 2015.[22] The United States District Court for the Northern District of Georgia

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13. FTC v. Phoebe Putney Health Sys., Inc., 2013 U.S. Dist. LEXIS 92321, at *3-5 (M.D. Ga. June 5, 2013).

14. Proposed Consent Agreement: *In re* Phoebe Putney Health Sys., Inc., 78 Fed. Reg. 53457 (Aug. 29, 2013).

15. 133 S. Ct. 2223 (2013).

16. *Id.* at 2227.

17. *Id.*

18. *Id.* at 2228.

19. *Id.*

20. *Id.* at 2227, 2229.

21. *Id.* at 2227, 2231.

22. *Id.* at 2229.

dismissed the FTC's lawsuit, and the Eleventh Circuit upheld that dismissal, holding that "a reverse payment settlement agreement generally is 'immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.'"[23]

The Supreme Court, however, reversed that decision and held that even if the result of the agreement was within the scope of the brand-name drug manufacturer's patent rights and the exclusivity that those rights grant to the brand-name drug manufacturer, the FTC should have been permitted to pursue its case to show the anticompetitive effects of the agreement.[24] In so holding, the Court set out five "sets of considerations" that it thought to be decisive: (1) that "the specific restraint at issue has the 'potential for genuine adverse effects on competition;'"[25] (2) that the "anticompetitive consequences will at least sometimes prove unjustified;"[26] (3) that "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice;"[27] (4) that "an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed;"[28] and (5) "the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit."[29] Although the Court made a point of explaining why its decision should not be considered a departure from its past holdings,[30] Chief Justice Roberts issued a strong dissent in the case,[31] which has already caused at least one lower court to express dismay at the prospect of applying *Actavis* to future reverse-payment cases.[32]

II. ELEVENTH CIRCUIT APPELLATE COURT DECISIONS

In *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*,[33] the Eleventh Circuit affirmed summary judgment for the defendant on

23. *Id.* at 2227 (quoting FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012)).
24. *Id.* at 2234.
25. *Id.* (quoting FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460 (1986)).
26. *Id.* at 2235-36.
27. *Id.* at 2236.
28. *Id.*
29. *Id.* at 2237.
30. *Id.* at 2233.
31. *Id.* at 2238 (Roberts, C.J., dissenting).
32. *See In re* Androgel Antitrust Litig. (No. II), MDL Docket No. 2084, 2013 U.S. Dist. LEXIS 174273, at *10 (N.D. Ga. Oct. 23, 2013).
33. 711 F.3d 1264 (11th Cir. 2013).

standing grounds.[34] The plaintiff in the case, Sunbeam Television Corp. (Sunbeam), which operated a network-affiliated television station in Miami, brought antitrust claims against Nielsen Media Research, Inc. (Nielsen), a television ratings service provider, after Nielsen changed its ratings method to employ a different audience measurement tool and Sunbeam's ratings dropped. Sunbeam alleged that Nielsen had engaged in exclusionary conduct to maintain its monopoly on television ratings services in the Miami-Fort Lauderdale market. Specifically, Sunbeam alleged that but for Nielsen's exclusionary conduct, other television ratings service providers would have entered the market and offered customers a better audience measurement tool than the one Nielsen used and this conduct resulted in a decline in ratings for Sunbeam.[35]

In analyzing Sunbeam's claim, the Eleventh Circuit focused, as had the United States District Court for the Southern District of Florida, on whether Sunbeam had antitrust standing—an analysis that typically involves an inquiry into whether there is an antitrust injury and whether the plaintiff is an efficient enforcer of the antitrust laws.[36] In this case, the court began with the efficient-enforcer inquiry and held that Sunbeam was not an efficient enforcer because it could not show a causal connection between the alleged exclusionary conduct and its alleged injury.[37] The critical point for the court's determination was that Sunbeam was required to show, but had not shown, that there were other television ratings service providers who were willing and able to enter the Miami-Fort Lauderdale market and who had not entered because of the exclusionary conduct.[38] Thus, the court affirmed the district court's holding that in the absence of such a showing, Sunbeam could not establish a causal connection between the alleged conduct and its alleged injury, and therefore, it was not an efficient enforcer of the antitrust laws.[39] As a result, the court affirmed partial summary judgment for Nielsen on antitrust standing grounds.[40]

In *Gulf States Reorganization Group, Inc. v. Nucor Corp.*,[41] the Eleventh Circuit affirmed summary judgment for Nucor because the plaintiff, Gulf States Reorganization Group (GSRG), had failed to support its alleged relevant market.[42] GSRG claimed that Nucor

34. *Id.* at 1273-74.
35. *Id.* at 1267-69, 1273-74.
36. *Id.* at 1271.
37. *Id.* at 1272-73.
38. *Id.* at 1273.
39. *Id.* at 1273-74.
40. *Id.*
41. 721 F.3d 1281 (11th Cir. 2013).
42. *Id.* at 1287.

attempted to monopolize the product market for black, hot-rolled coiled steel by working with third parties to purchase a steel plant in Alabama out of bankruptcy, thus ensuring that none of Nucor's competitors would be able to use the plant to compete with Nucor.[43] The court, however, held that GSRG could not support its relevant product market because it failed to account for the fact that manufacturers of "pickled and oiled" steel—black, hot-rolled coiled steel that has undergone an additional process—could easily shift their manufacturing efforts to produce more black, hot-rolled coiled steel, particularly if the prices for black, hot-rolled coiled steel increased.[44] Because GSRG's relevant product market excluded those manufacturers and did not take into account the cross-elasticity of supply with pickled and oiled steel, its relevant market definition failed, and as a consequence, its attempted monopolization claim failed as well.[45]

III. ELEVENTH CIRCUIT DISTRICT COURT DECISIONS

During 2013, the district courts in the Eleventh Circuit issued four notable antitrust decisions. All four decisions were issued from only two courts—the United States District Court for the Southern District of Florida and the United States District Court for the Middle District of Florida.

In *Procaps S.A. v. Patheon Inc.*,[46] the Southern District of Florida denied the defendant's motion to dismiss and permitted the plaintiff's claim of a per se violation of Section 1 of the Sherman Act[47] to proceed.[48] The case involved a dispute between parties to a contract for the distribution and marketing of softgel capsules used for pharmaceuticals. Procaps owned the softgel technology, and Patheon had the right to market that technology under the parties' agreement. During the contract term, however, Patheon purchased another company that competed with Procaps, in that it also specialized in softgel products. Procaps raised its concerns about the acquisition with Patheon, who failed to address the concerns. Procaps filed suit, claiming that its contract with Patheon, though initially a procompetitive vertical agreement, was now, by virtue of Patheon's acquisition of a company in competition with Procaps, an unreasonable restraint on trade and a per se violation of the Sherman Act. Patheon moved to dismiss Procaps's

43. *Id.* at 1285.
44. *Id.* at 1286-87.
45. *Id.* at 1287.
46. 2013 U.S. Dist. LEXIS 35640 (S.D. Fla. Feb. 25, 2013).
47. 15 U.S.C. § 1 (2012).
48. 2013 U.S. Dist. LEXIS 35640, at *7, *9.

claims, but the court denied the motion, holding that Procaps had sufficiently alleged a per se violation in light of the now-horizontal nature of the contract.[49] The court further held that Procaps had standing to bring its claim because it had alleged an antitrust injury—that is, "an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'"[50]

In *Duty Free Americas, Inc. v. Estée Lauder Cos.*,[51] another case from the Southern District of Florida, the court granted defendant Estée Lauder's motion to dismiss claims by Duty Free Americas (DFA).[52] DFA claimed that Estée Lauder had conspired with DFA's competitors to exclude DFA from the market for duty-free retail shops in airports and that Estée Lauder had also conspired with DFA's competitors to monopolize the market for beauty products sold in those shops. The dispute arose when Estée Lauder announced an increase in prices on the beauty products that duty-free retailers purchased from Estée Lauder and sold in airport shops. DFA did not want to accept the price increase and stopped purchasing beauty products from Estée Lauder. When Estée Lauder did not actually raise its prices as planned, however, DFA tried to renew its relationship with Estée Lauder, but Estée Lauder refused. DFA later submitted bids to various airports to operate their duty-free retail shops, but the fact that DFA did not carry Estée Lauder products—a fact that Estée Lauder was partly responsible for communicating to the airports—cost DFA several of the airport contracts. DFA claimed that Estée Lauder's refusal to deal with DFA and its communications with the airports were part of an anticompetitive agreement to exclude DFA from the market for United States airport duty-free stores and to monopolize the market for selling beauty products in those stores.[53] DFA also alleged that Estée Lauder attempted to monopolize the market for beauty products in duty-free stores, in violation of § 2 of the Sherman Act.[54]

The court dismissed DFA's Sherman Act § 1 claim because DFA had not plausibly alleged an anticompetitive agreement between Estée Lauder and DFA's competitors.[55] The court held that Estée Lauder and

49. *Id.* at *2-3, *5-7.

50. *Id.* at *7 (quoting Gulf States Reorg. Grp., Inc. v. Nucor Corp., 466 F.3d 961, 966 (11th Cir. 2006)).

51. 946 F. Supp. 2d 1321 (S.D. Fla. 2013).

52. *Id.* at 1324.

53. *Id.* at 1324-29.

54. *Id.*

55. *Id.* at 1334.

DFA's competitors had independent economic incentives to communicate to the airports which bidders carried Estée Lauder products.[56] For Estée Lauder, it was reasonable to want an airport to choose a bidder that carried its products; for DFA's competitors, it was reasonable to want an airport to know that they carried the popular beauty products.[57] Thus, the court held that the independent reasons for Estée Lauder and DFA's competitors to take the alleged actions were more plausible than DFA's allegation that the actions were the result of an illegal agreement to exclude DFA from the market or to monopolize the market.[58] On DFA's attempted monopolization claim, the court held that DFA had failed to allege anticompetitive conduct and that DFA's factual allegations actually suggested a competitive market for beauty products sold in airport duty-free stores.[59]

In *Clifton-Draper v. Pelam International, Ltd.*,[60] the Middle District of Florida granted the defendants' motion for summary judgment on the plaintiffs' Sherman Act claim.[61] The case arose out of Pelam's refusal to sell its products to the plaintiffs, following a trademark dispute.[62] In addition, Pelam entered into a contract with one of its customers to prevent the plaintiffs from obtaining Pelam's products indirectly through that customer. The plaintiffs sued Pelam, claiming that Pelam's contract with the other customer violated the Sherman Act. The plaintiffs, however, did not allege a relevant market for their claim. Thus, they could not allege that the agreement between Pelam and its customer had an adverse effect on competition in any relevant market. The court held that the failure to show—or even allege—a relevant market was fatal to the plaintiffs' claims, and that the Sherman Act protected competition, not individual competitors.[63] As a result, the court granted Pelam's motion for summary judgment and dismissed the plaintiffs' claims.[64]

Similarly, in *Astro Tel, Inc. v. Verizon Florida, LLC*,[65] the other 2013 antitrust decision from the Middle District of Florida, the plaintiff's monopolization claims failed on the relevant market element.[66] In that case, Astro Tel alleged several non-antitrust and antitrust claims against

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1337-38.
60. 2013 U.S. Dist. LEXIS 148664 (M.D. Fla. Oct. 11, 2013).
61. *Id.* at *2, *18.
62. *Id.* at *3-5.
63. *Id.* at *5-7, *9, *17-18.
64. *Id.* at *18.
65. 979 F. Supp. 2d 1284 (M.D. Fla. 2013).
66. *Id.* at 1293.

Verizon; the antitrust claims included three separate Sherman Act § 2 claims: monopolization, attempted monopolization, and monopoly leveraging. All of the claims arose out of Verizon's alleged conduct as the incumbent local exchange carrier, whose services Astro Tel purchased and resold.[67] For each of Astro Tel's claims, however, it had to support its alleged relevant market, which in the Eleventh Circuit requires expert testimony.[68] Nevertheless, Astro Tel failed to support its allegations with expert testimony, and the court granted Verizon summary judgment on the antitrust claims.[69]

67. *Id.* at 1289-90, 1292.

68. *Id.* at 1292-93.

69. *Id.* at 1293-94 (The court granted summary judgment on the non-antitrust claims as well, but for different reasons.).

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