GCR

US COURTS
ANNUAL REVIEW

FOURTH EDITION

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Preface

Global Competition Review (GCR) is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers in-depth analysis of longer-term trends provided by leading practitioners in key jurisdictions. Within that broad stable, we are delighted to include the fourth iteration of the *US Courts Annual Review*, which takes a deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by circuit around the United States, allowing our valued contributors both to analyse important local decisions and to draw together national trends that point to a direction of travel in antitrust litigation. Both much-discussed developments and infrequently noted decisions are thus brought to the surface, allowing readers to gain a comprehensive understanding of how US judges are interpreting antitrust law and its evolution.

For this digital-only fourth edition, the Review also includes exclusive data from Docket Navigator. In-depth charts drill down into the raw data – from the number of fresh cases filed every year to the average case duration – to give readers primary insights from the front line. The chapters focusing on particular circuits are also complemented by charts that provide a snapshot of everything from active numbers of antitrust cases to the number of cases that are closed off every year.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the United States, whose knowledge and experience have been essential in drawing together these developments. We thank all the contributors for their time and effort in compiling this Review.

Although every effort has been made to ensure that all matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to GCR will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Docket Navigator Data

GCR's *US Courts Annual Review*'s digital-only fourth edition is supplementing the in-depth commentary with some raw numbers on antitrust case filing data. The charts on the following pages have been provided by Docket Navigator (owned by GCR's parent company, Law Business Research) – a market-leading business intelligence platform that has reviewed and flagged 6.7 million docket entries to date, allowing it to provide exclusive data on US filing patterns.

From the average length of cases to the numbers of fresh antitrust cases being filed each year, this data adds a fresh dimension to the expert commentary provided by our authors to allow even greater understanding of this fast-moving space.

US antitrust cases in 2022

366

Antitrust cases filed

1,478

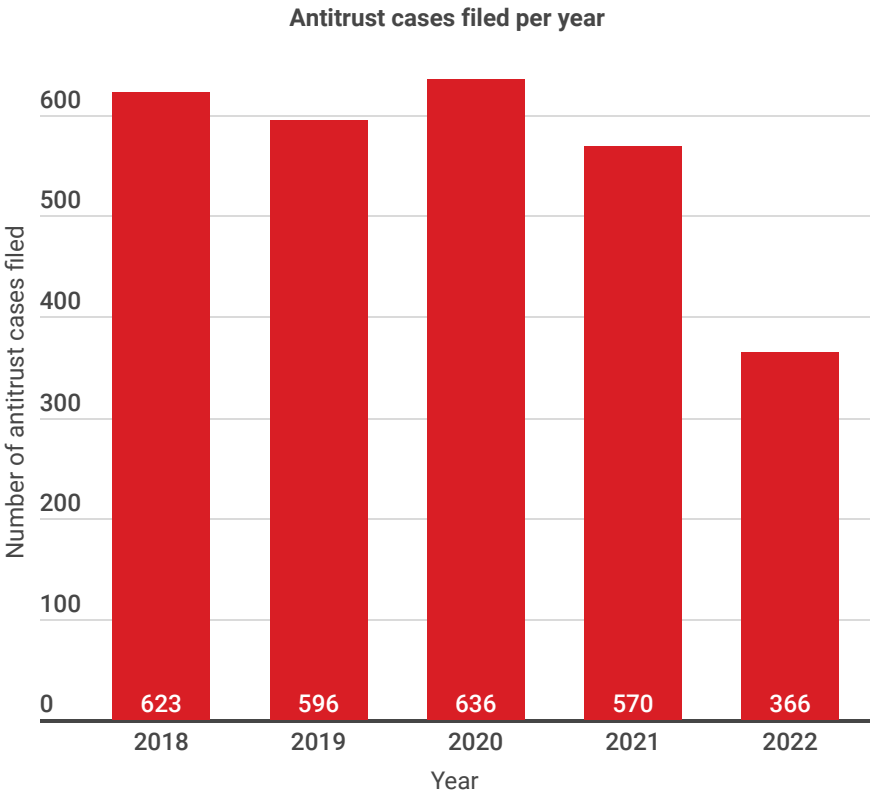
Active antitrust cases

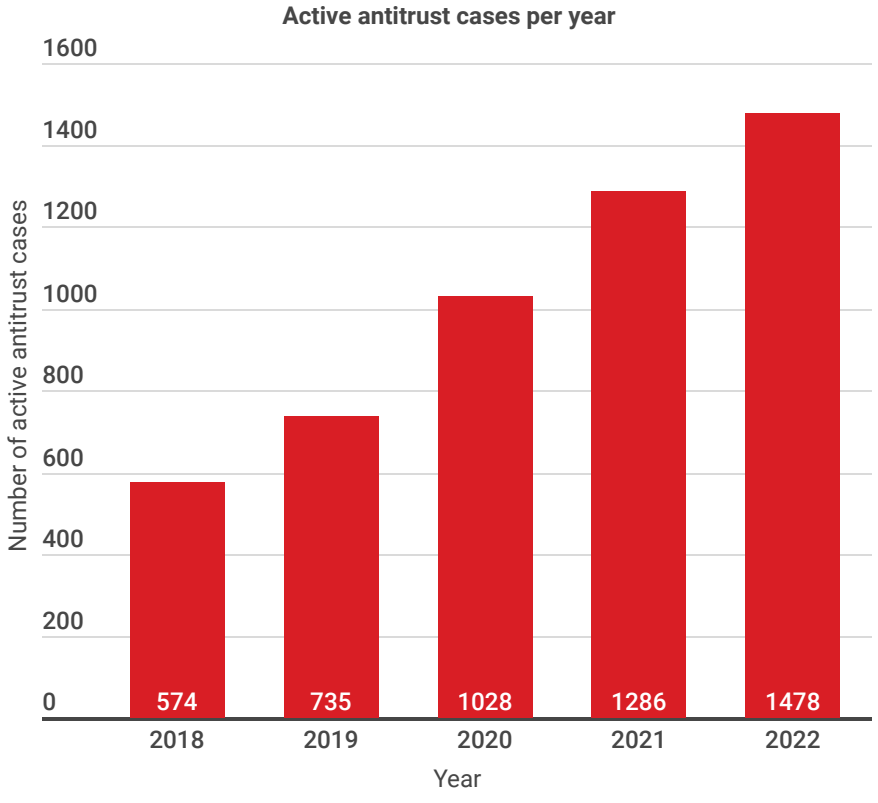
435

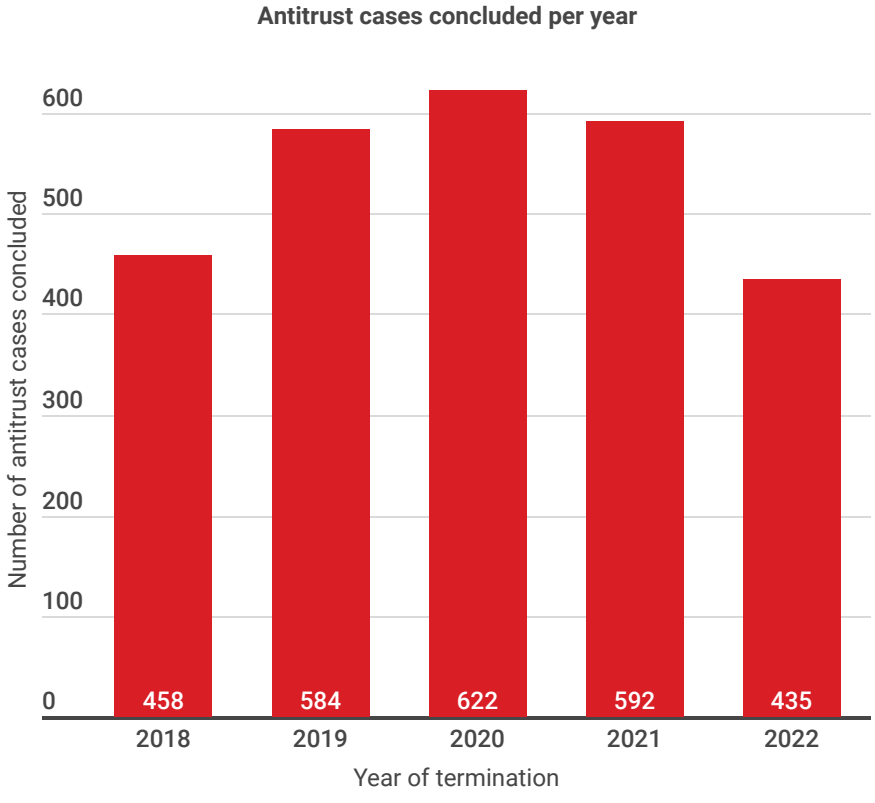
Antitrust cases concluded

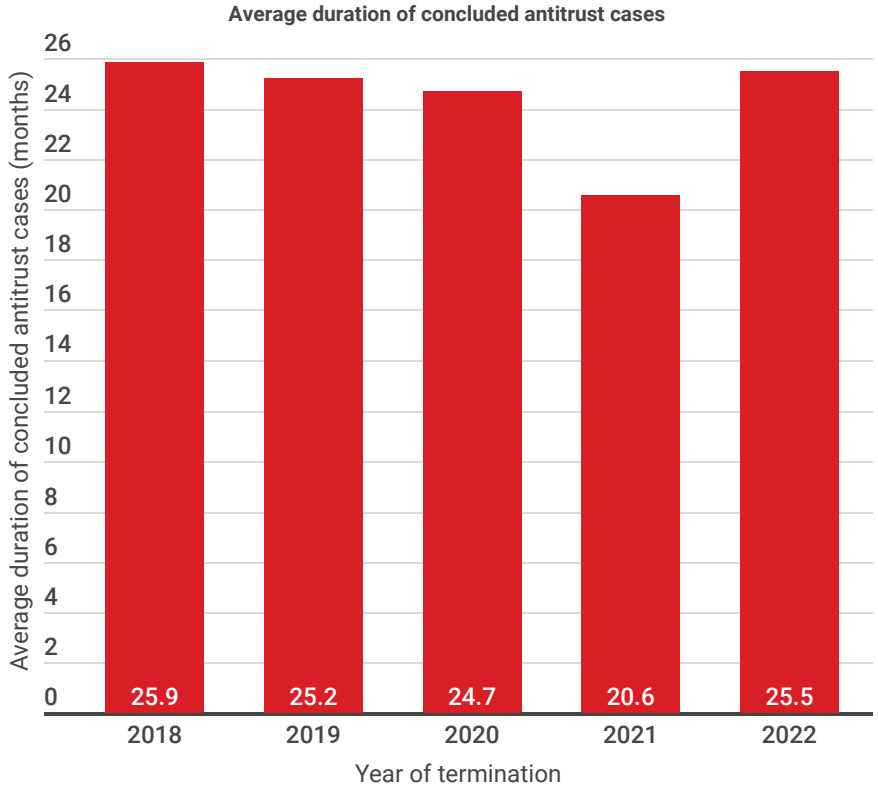
25.5

Average length (in months) of concluded cases


Antitrust cases filed per year
Number of antitrust cases filed
600
500
400
300
200
100
0
623
596
636
570
366
2018
2019
2020
2021
2022
Year


Active antitrust cases per year
Number of active antitrust cases
1600
1400
1200
1000
800
600
400
200
0
574
735
1028
1286
1478
2018
2019
2020
2021
2022
Year

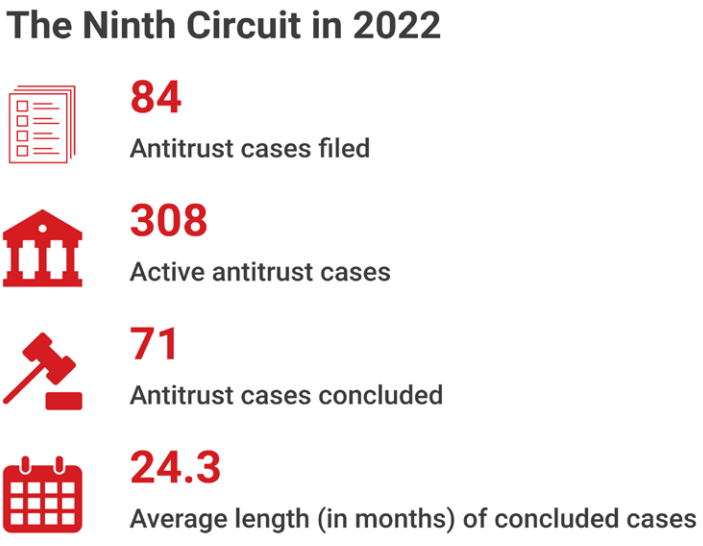

Antitrust cases concluded per year
Number of antitrust cases concluded
600
500
400
300
200
100
0
458
584
622
592
435
2018
2019
2020
2021
2022
Year of termination


Average duration of concluded antitrust cases
Average duration of concluded antitrust cases (months)
26
24
22
20
18
16
14
12
10
8
6
4
2
0
25.9
25.2
24.7
20.6
25.5
2018
2019
2020
2021
2022
Year of termination

CHAPTER 7

Ninth Circuit: Apple Case Leads to Additional Clarity on Section 1 Claims

Michael E Martínez, Lauren Norris Donahue, John E Susoreny, Brian J Smith, Derek A Sutton, and Victoria S Pereira[1]



Epic Games v Apple

Epic Games, the video game company best known for its highly popular game Fortnite, challenged three of Apple's App Store policies included in its developer program licensing agreement:

- Apple's restriction of app distribution on iOS devices exclusively to the App Store (the distribution restriction);

1 Michael E Martínez and Lauren Norris Donahue are partners, John E Susoreny is a counsel, and Brian J Smith, Derek A Sutton, and Victoria S Pereira are associates at K&L Gates LLP.

- Apple's requirement that in-app purchases on iOS devices use Apple's in-app payment processor and no other (the IAP requirement); and
- Apple's limitation on the ability of app developers to communicate the availability of alternative payment options to iOS device users (the anti-steering provision).[2]

Among other legal claims against Apple, Epic brought a Section 1 claim alleging that Apple's developer program licensing agreement was an unreasonable restraint of trade; a tying claim involving the distribution restriction and IAP requirement; and an 'unfair prong' claim under California's Unfair Competition Law (UCL). After a bench trial, Judge Yvonne Gonzalez Rogers of the Northern District of California issued an order rejecting Epic's antitrust claims but granting its UCL claim. Both parties appealed on multiple grounds. The Ninth Circuit affirmed, although it identified multiple errors in the district court's analysis and, in doing so, clarified several important issues.

Market definition

Citing the Supreme Court's *Kodak*[3] and the Ninth Circuit's *Newcal*[4] decisions, Epic proposed single-brand markets – aftermarkets for iOS app distribution and iOS in-app payment solutions, derived from a foremarket for smartphone operating systems. The panel determined that Epic and the district court had applied the wrong test for establishing single-brand aftermarkets and clarified that establishing a single-brand aftermarket requires showing:

- the challenged aftermarket restrictions are 'not generally known' when consumers make their foremarket purchase;
- 'significant' information costs prevent accurate life cycle pricing;
- 'significant' monetary or non-monetary switching costs exist; and
- general market-definition principles regarding cross-elasticity of demand do not undermine the proposed single-brand market.[5]

The district court had rejected Epic's market definitions based on a categorical rule that an antitrust market can never relate to a product that is not licensed or sold. In this case, iOS, the operating system for Apple's iPhone and iPad, was not

2 *Epic Games, Inc. v. Apple, Inc.*, 2023 WL 2050076, at *4 (9th Cir. 2023).
3 *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).
4 *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038 (9th Cir. 2008).
5 *Epic Games*, 2023 WL 2050076, at *12-13.

sold separately from those devices. The Ninth Circuit concluded that this was a legal error because that rule is inconsistent with the Supreme Court's instruction in *Amex*,[6] which provides that courts should conduct market-definition inquiries based not on 'formalistic distinctions' but on 'actual market realities,' and with decisions defining product markets to include vertically integrated firms that self-provision the relevant products but make no outside sales, citing *US v Microsoft*.[7] The panel's majority, however, deemed the district court's market definition error to be harmless owing to Epic's separate failure of proof to support its proposed markets. In his partial dissent, Judge Thomas criticized the majority for engaging in 'appellate court fact-finding' in this regard and remarked that such an error cannot be harmless because a trial court cannot properly perform a rule of reason analysis '[u]nless the correct relevant market is identified.'[8]

Section 1 – unreasonable restraint

The Ninth Circuit clarified two key issues related to Epic's Section 1 claim. First, it held that the district court erred when it ruled that Apple's developer program licensing agreement fell outside the scope of Section 1 because it was a non-negotiated, adhesive contract. The panel determined that the exemption for adhesive contracts 'plainly contradicts' Section 1's text, which reaches '[e]very contract, combination . . . or conspiracy' that unreasonably restrains trade, and also is contrary to the many antitrust cases involving agreements in which one party sets terms to which the other reluctantly acquiesces.[9]

Second, the panel clarified the burden shifting framework for Section 1 rule of reason cases where plaintiffs fail to carry their step-three burden of establishing less restrictive alternatives. Acknowledging that the Ninth Circuit's case law on this issue was inconsistent, the panel held that in those cases, trial courts must engage in a fourth step of balancing anticompetitive effects against procompetitive justifications. The panel was 'skeptical of the wisdom of superimposing a totality-of-the-circumstances balancing step onto a three-part test that is already intended to assess a restraint's overall effect.'[10]

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6 *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2285 (2018) (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)).

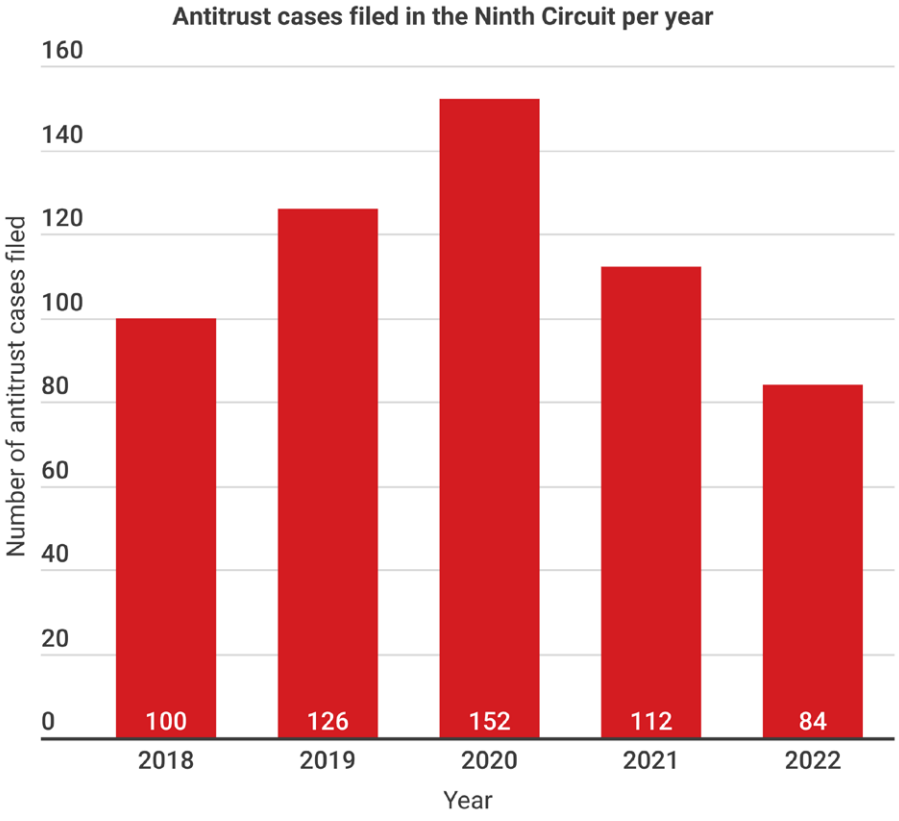
7 *United States v. Microsoft Corp.*, 253 F.3d 34, 73 (D.C. Cir. 2001).

8 *Epic Games*, 2023 WL 2050076, at *36.

9 *Id.* at *16–17.

10 *Id.* at *26.

However, given the trial court's preceding analysis, often it will need only to 'briefly confirm[] the result suggested by a step-three failure: that a business practice without a less restrictive alternative is not, on balance, anticompetitive.'[11] As proof of this point, the panel held that while the district court had failed to explicitly reach the required fourth balancing step, its one sentence conclusion that the restraints at issue 'have procompetitive effects that offset their anticompetitive effects' was sufficient.[12]



11 *Id.* at *27.

12 *Id.*

Tying

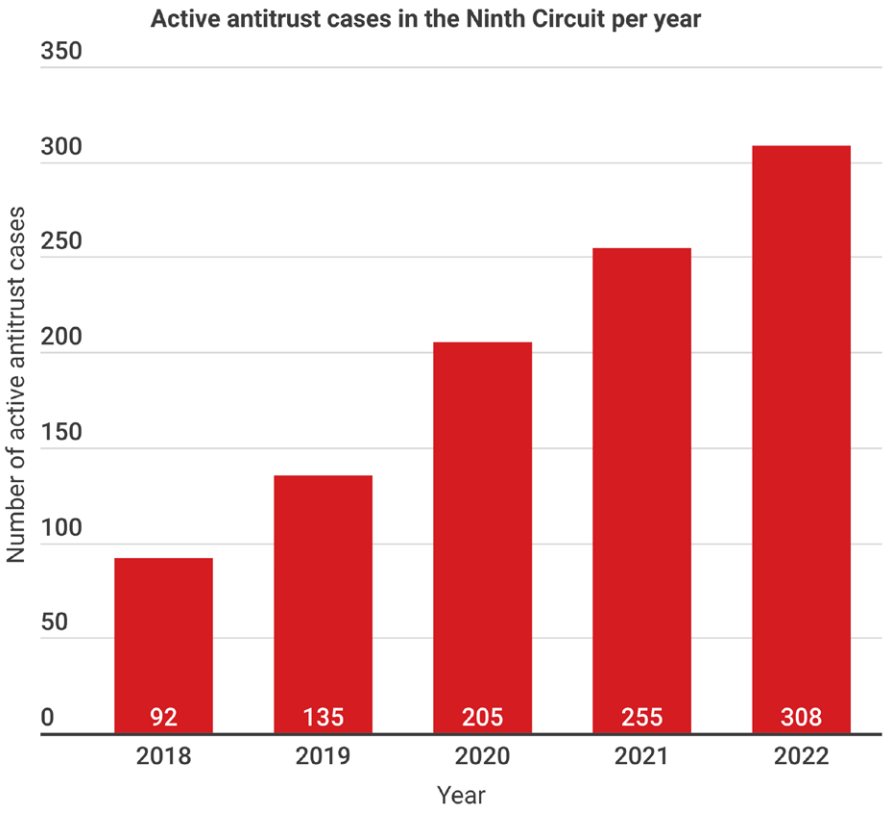
The Ninth Circuit rejected the district court's legal conclusion that a product in a two-sided market (in this case, the market for mobile gaming transactions) can never be broken into multiple products (in this case, app distribution and in-app payment processing), stating that such a rule was not required by the Supreme Court's *Amex* decision regarding two-sided markets.[13]

Nevertheless, while recognizing that Apple's tying of app distribution and in-app payment processing met the requirements for per se unlawfulness, the panel held that per se condemnation was inappropriate for ties 'involv[ing] software that serves as a platform for third-party applications' and upheld Apple's tie as clearly lawful under the rule of reason.[14] The panel stated that it lacked sufficient experience with tying arrangements in software markets, which it described as 'highly innovative' and featuring 'short product lifetimes,' to have the level of confidence necessary to universally condemn ties related to app-transaction platforms that combine multiple functionalities.[15]

UCL

The Ninth Circuit affirmed the trial court's conclusion that Apple's anti-steering provision violates the 'unfair prong' of California's UCL, despite the same conduct failing to constitute an antitrust violation. The panel rejected Apple's argument that failure to prove an antitrust claim (i.e., that Apple's anti-steering provision violated the Sherman Act or California's antitrust statute, the Cartwright Act) necessarily means that an 'unfair prong' UCL claim based on the same conduct also must fail. The panel distinguished Ninth Circuit and California case law applying the UCL's 'safe harbor doctrine,' which bars a UCL action where the law clearly permits certain conduct or imposes a 'categorical legal bar' precluding a cause of action, holding that Apple's proposed rule would 'collapse the [UCL's otherwise separate] "unfair" and "unlawful" prongs into each other.'[16]

13 *Id.* at *27-28.
14 *Id.* at *29-30.
15 *Id.*
16 *Id.* at *33.



Olean Wholesale Grocery Coop v Bumble Bee Foods

Several classes of tuna purchasers brought a lawsuit against the largest suppliers of canned tuna, alleging that tuna suppliers violated state and federal antitrust laws by engaging in a price-fixing conspiracy.[17] Plaintiffs moved for certification of three putative subclasses: (1) direct purchasers, such as nationwide retailers and regional grocery stores; (2) indirect bulk purchasers; and (3) individual end purchasers.[18]

During class certification, both parties put forth expert testimony regarding antitrust impact. The plaintiffs' theory was that the defendants' conduct allegedly raised all canned tuna prices so antitrust injury was common, whereas the defendants' expert put forth evidence that approximately 28 percent of the proposed classes suffered no overcharge and no antitrust injury. In July 2019, the district court certified all three subclasses.[19]

17 *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 662 (9th Cir. 2022).
18 *Id.*
19 *Id.*

On appeal, a panel of the Ninth Circuit vacated the district court's order, holding that the plaintiffs failed to show that common questions predominate over individualized ones in relation to antitrust impact when there is a non–*de minimis* number of uninjured class members in the proposed classes and that when a class contains more than a *de minimis* number of uninjured persons, a Rule 23(b)(3) class cannot be certified.[20]

Following *en banc* review, the Ninth Circuit affirmed the district court's ruling certifying all three classes. The majority highlighted that the tuna purchasers put forth an expert's model that estimated that the conspiracy resulted in a 10.28 percent overcharge on tuna for the entire class[21] and that the tuna suppliers' expert's assertion that the model did not show a statistically significant price difference for 28 percent of the class was not sufficient to threaten certification.[22]

The court's opinion focused on how to determine whether plaintiffs have satisfied two Rule 23 prerequisites: whether a common question exists under Rule 23(a)(2) and whether any such questions predominate over individualized issues under Rule 23(b)(3). First, the court held that Rule 23(b)(3) predominance requirements must be demonstrated by a preponderance of the evidence.[23] Second, the court emphasized that in determining whether plaintiffs have shown that a common question exists, a district court 'is limited to resolving whether the evidence establishes that a common question is capable of class-wide resolution, not whether the evidence in fact establishes the plaintiffs would win at trial.'[24]

The court explained that 'a district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue.'[25] In making this determination, a district court may have to resolve disputes between the parties' experts, in which case the test is whether 'if the class members had pursued individual lawsuits, each could have relied on the expert evidence' on the merits, not whether the expert evidence 'in fact establishes that plaintiffs would win at trial.'[26]

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20 *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 794 (9th Cir. 2021), reh'g en banc granted, 5 F.4th 950 (9th Cir. 2021).

21 *Id.* at 677–78.

22 *Id.* at 680–81.

23 *Olean*, 31 F.4th, at 664–65.

24 *Id.* at 666–67.

25 *Id.* at 667.

26 *Id.* at 668.

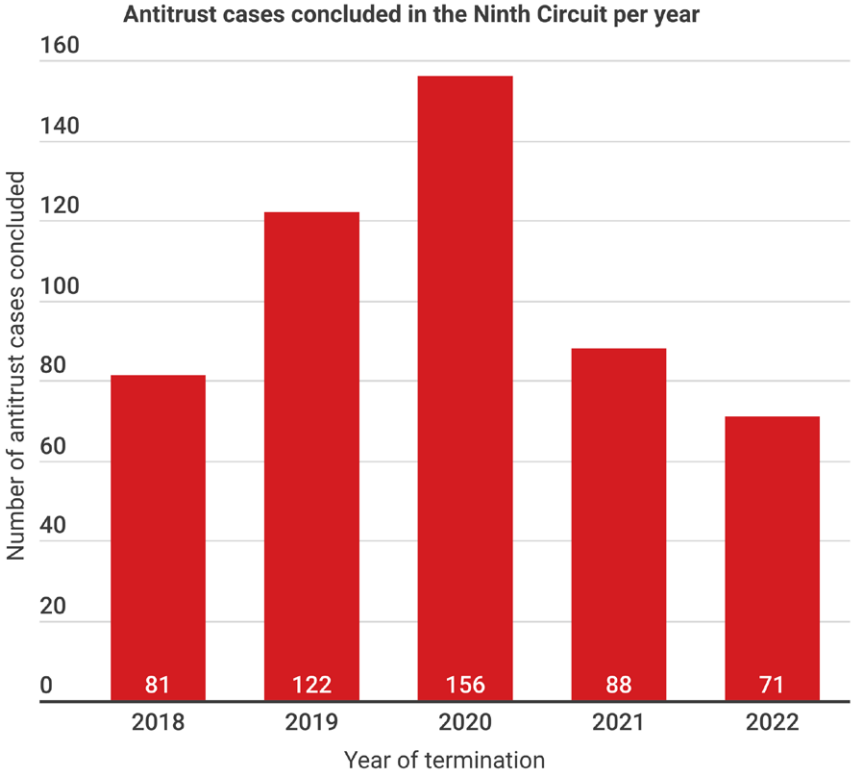
The *en banc* panel also considered whether Rule 23(b)(3) can be satisfied when a putative class contains more than a *de minimis* number of uninjured class members. Because Rule 23(b)(3) requires only 'that the court determine whether individualized inquiries about such matters would predominate over common questions,' the court rejected the bright line rule of the *de minimis* formulation articulated by the original Ninth Circuit panel; however, the majority opinion notably contains several footnotes limiting its own opinion.[27] For example, the court noted that '[w]hen a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification,' but also explained that in those circumstances, the district court may redefine the class rather than denying certification. The court, however, cautioned that a district court may not create a 'fail safe' class that is defined to include only individuals who were injured by the allegedly unlawful conduct; doing so, would be improper.

The court also briefly touched on the question of Article III standing, declining to expressly address whether 'the presence of a large number of uninjured class members raises an Article III issue.' Instead, it held that it need not consider the Article III issue because the tuna purchasers have demonstrated that all class members have standing.[28] The court relied on the general principle that a plaintiff must prove standing 'with the manner and degree of evidence required' at each stage of the litigation and held that evidence capable of showing class-wide antitrust impact satisfies Article III standing at the class certification stage.[29] It did, however, overrule its prior statement that 'no class may be certified that contains members lacking Article III standing' because, at least in cases involving only injunctive or equitable relief, 'only one plaintiff need demonstrate standing to satisfy Article III.'[30]

Two judges dissented from the majority opinion. The dissent argued that classes with more than a *de minimis* number of uninjured members 'cannot present a predominance of common issues because they have nothing in common with the remaining sliver of injured members.' The dissent disagreed that an oversized class with unharmed class members does not pose a practical problem even if a method can separate the uninjured from the injured at trial. Judge Lee would have held that such classes therefore fail to satisfy Rule 23(b)(3).

27 *Id.* at 669.
28 *Id.* at 682.
29 *Id.*
30 *Id.* at 682 n. 32.

The dissent also noted that Rule 23 imposes a requirement on the trial court, where the trial court can only certify a class after engaging in a rigorous analysis and determining that the plaintiffs have satisfied Rule 23.[31] The dissent explained Rule 23's rigorous analysis requires a court to do more than just consider one side's expert opinion as 'reliable and then kick the can down the road until trial' and instead 'must dig into the weeds and decide the battle of dueling experts if their disputes implicates Rule 23 requirements.'[32] The dissent also explained that the Ninth Circuit's rejection of the *de minimis* test creates a circuit split with the DC Circuit and the First Circuit.[33] The dissent noted that while a plaintiff is not required to show that every putative class member was injured or suffered antitrust impact, the number of uninjured class members must still be small based on Rule 23's language, common sense, and precedent from other circuits.[34]



31 *Id.* at 687.
32 *Id.*
33 *Id.* at 692.
34 *Id.* at 691.

Flaa v Hollywood Foreign Press Association

In August 2020, Kjersti Flaa – an entertainment journalist from Norway but based in Los Angeles – filed suit in the Central District of California against the Hollywood Foreign Press Association (HFPA), alleging that the HFPA's refusal to admit her and other qualified journalists violated federal and state antitrust law and California's common-law right to fair procedure.[35] After the district court dismissed the complaint without prejudice, Flaa then joined Rosa Gamazo as a co-plaintiff and filed an amended complaint.

In the amended complaint, the journalists asserted that the HFPA had committed per se antitrust violations by engaging in a group boycott and agreeing on a horizontal market division. The district court dismissed the amended complaint and denied further leave to amend. The court rejected the group boycott theory because the journalists did not 'offer non-conclusory allegations that the HFPA or its members have market power' or 'plead facts establishing a joint effort among horizontal competitors.'[36] The court rejected the market division theory because, as it understood the complaint, 'HFPA members are generally not able to compete with one another because of the peculiar characteristics of each geographic submarket,' and '[i]f HFPA members cannot compete, then they cannot agree to divide a market.' The court also rejected the antitrust claims under the rule of reason because 'the allegations in the amended complaint remain "hopelessly muddled as to what product market (or markets) are at issue here"' and the complaint did not plausibly allege that the HFPA has market power.

The journalists appealed. On *de novo* review, the Ninth Circuit noted the following:

> *The journalists assert two theories of per se liability. First, they allege that the HFPA's membership practices have produced an anti-competitive group boycott of all non-member foreign entertainment journalists. Second, they allege that HFPA members have unlawfully agreed to divide the foreign entertainment news market among themselves. Alternatively, the journalists argue that the HFPA's practices are unlawful under the rule of reason.*[37]

The panel found that the journalists failed to state a claim under any of those theories.

35 *Flaa v. Hollywood Foreign Press Association*, 55 F.4th 680 (9th Cir. 2022).
36 *Id.* at 687.
37 *Id.* at 688.

First, the Ninth Circuit found there was no group boycott because 'HFPA's admissions practices possess none of the characteristics that the Supreme Court has identified as calling for per se condemnation'; in other words, HFPA has not 'cut off access to a supply . . . necessary to enable the boycotted firm to compete,' and the 'HFPA lacks market power.'[38] Ultimately, the panel came to the following conclusion:

> *Because the membership decisions of a small, private professional organization like the HFPA are not so likely to prove 'harmful to competition and so rarely prove justified' to warrant condemnation as a per se unreasonable group boycott, we conclude that the HFPA's admissions practices should instead be analyzed under the rule of reason.*[39]

Second, the Ninth Circuit found the following:

> *The complaint . . . describes not one global market for entertainment news, but separate geographic submarkets. As the district court observed, those allegations mean that HFPA members from different countries cannot compete with each other. If the members are unable to compete in the same market, they are unable to agree to divide the market.*[40]

Accordingly, the panel found that the complaint itself 'defeats its own market-division theory.'[41]

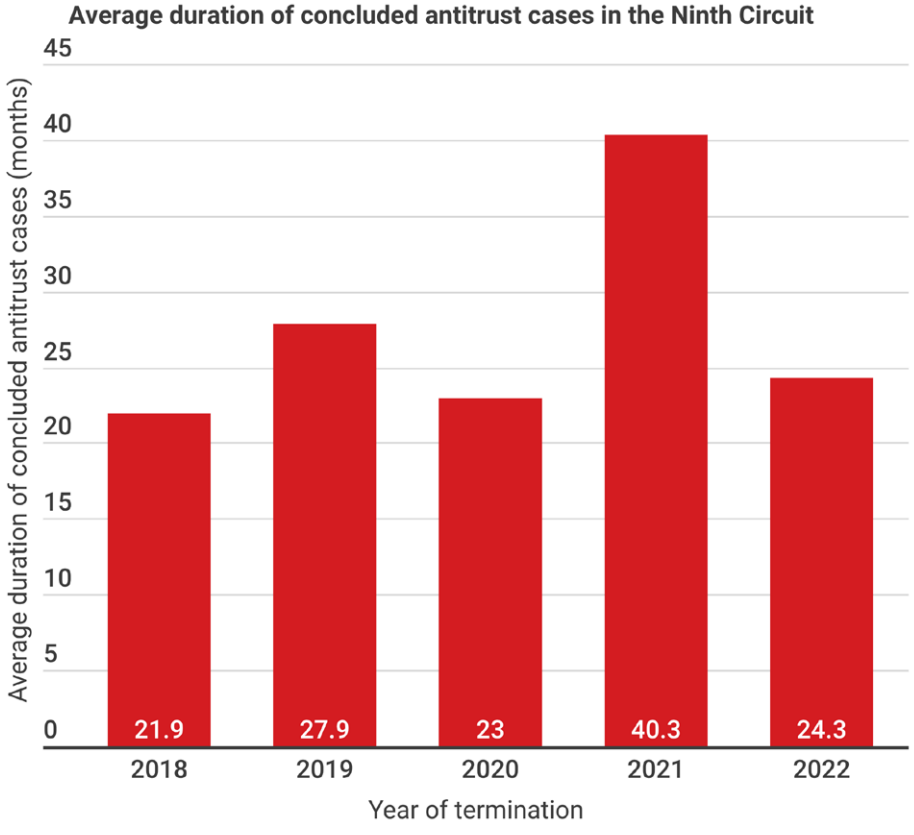
The court then applied the rule of reason to the plaintiffs' antitrust claims, finding that the complaint 'does not plausibly allege market power.'[42] Specifically, the panel came to the following conclusion:

> *The HFPA lacks market power in the journalists' proposed market – or any other reasonably defined market. The HFPA has 85 members, and according to the complaint, only half of those 85 members are 'active' journalists, and only '[t]wo or three dozen' members 'are legitimate, respected media figures.' The rest are 'intermittent freelancers at best.' The complaint contains no quantitative allegations suggesting that this small group of journalists possesses market power in the global market for news about American*

38 *Id.* at 689–90.
39 *Id.* at 691.
40 *Id.*
41 *Id.* at 692.
42 *Id.* at 694.

> *movies or entertainment, and while that omission is not fatal by itself, the journalists have not pleaded any other facts that would move the hypothesis of market power 'across the line from conceivable to plausible.'*[43]

Accordingly, the Ninth Circuit affirmed dismissal of the journalists' complaint for failure to state an antitrust claim.



PLS.com v National Association of Realtors

In one of several lawsuits alleging that the practices of the National Association of Realtors (NAR) and various of its associated multiple listing services (MLSs) violate antitrust laws, a private real estate listing service challenged the NAR's policy of requiring member brokers to post a property on an NAR-affiliated MLS within a day of marketing that property through another brokerage service. The plaintiff, PLS.com (PLS), a service launched in 2017 that catered to real

43 *Id.* at 693–94.

estate listings not shared on an NAR-affiliated MLS, alleged that NAR's newly adopted clear cooperation policy, when implemented by NAR-affiliated MLSs, caused agent participation in its platform to drop and constituted an illegal group boycott. The district court granted the defendants' motions to dismiss because it concluded that PLS did not allege antirust injury.[44]

The Ninth Circuit reversed.[45] Following the adoption of NAR's clear cooperation policy, PLS alleged that listings were removed from its service and moved to NAR-affiliated MLSs and that agent participation in PLS declined, thereby harming PLS and consumers.[46] The district court had held that to allege antitrust injury, PLS was required to allege that NAR's policy directly harmed 'ultimate consumers,' which the court identified as 'home buyers and sellers.'[47]

The Ninth Circuit rejected the district court's holding that only an allegation of harm to the ultimate consumer could constitute antitrust injury. Businesses that use a product or service as an input to provide another product or service can also be consumers for the purposes of assessing antitrust injury. PLS was, therefore, not required to allege harm to home buyers and sellers; its allegation that NAR's policy harmed real estate agents – the consumers of PLS's and the MLSs' listing services – may suffice to allege antitrust injury.[48]

After finding sufficient allegations of antitrust injury, the court then assessed whether PLS had alleged the other elements of a Sherman Act violation. Noting allegations that PLS's competitors (i.e., NAR-affiliated MLSs) coerced its suppliers (i.e., realtors) not to supply PLS with the listings necessary to effectively compete in the market, the court held that PLS had adequately alleged a per se group boycott but left it to the district court to determine whether it should apply a per se or rule or reason analysis at later stages of the litigation.[49]

The Ninth Circuit discussed the extent to which the Supreme Court's *Amex*[50] holding applied. The district court had held that an MLS constitutes a two-sided market and that *Amex* required PLS to allege a plausible injury to both sides of the market: home sellers and home buyers.[51] On appeal, PLS argued that *Amex* did not apply at the motion to dismiss stage or to networks not involving simultaneous

44 *PLS.com v. Nat'l Ass'n of Realtors*, 32 F.4th 824 (9th Cir. 2022).
45 *Id.*
46 *Id.* at 831.
47 *Id.* at 832.
48 *Id.* at 833.
49 *Id.* at 834–35.
50 *American Express Co.*, 138 S.Ct.
51 *PLS. com*, 32 F.4th, at 839.

transactions, while defendants argued that the value of the listing service to buyers (or sellers) depended on how many sellers (or buyers) participated (the indirect network effects) and thereby triggered *Amex*'s requirements. The Ninth Circuit held that, regardless of the test applied, PLS satisfied *Amex*'s requirements because it had alleged harm to both buyers and sellers, and it was therefore unnecessary to decide 'the more difficult questions the parties raise about how broadly the *Amex* decision applies.'[52] As further guidance, it noted the following:

> *Amex does not require a plaintiff to allege harm to participants on both sides of the market. All Amex held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the 'market as a whole.'*[53]

In January 2023, the Supreme Court denied NAR's petition for certiorari.[54]

A similar case that likewise challenged NAR's clear cooperation policy was dismissed with prejudice by the Northern District of California District Court in 2021 and is on appeal before the Ninth Circuit as at the time of writing.[55] In March 2023 the US Department of Justice filed an amicus brief in that case, arguing that NAR's rules on buyer's agent commissions violate antitrust laws and harm competition in the real estate industry. Coupled with other lawsuits currently challenging various, allegedly anticompetitive aspects of NAR's practices in various jurisdictions,[56] the resolutions of these cases have the potential to significantly impact how real estate is bought and sold in the United States.

Mickelson v PGA Tour

In August 2022, numerous golf professionals who had been participating in the Saudi-financed LIV Golf series (LIV) filed a lawsuit in the US District Court for the Northern District of California against the Professional Golf Association

52 *Id.* at 837.
53 *Id.* at 839.
54 *Nat'l Ass'n of Realtors v. PLS.com, LLC*, 2023 WL 124044 (U.S. Jan. 9, 2023).
55 *Top Agent Network, Inc. v. Nat'l Ass'n of Realtors*, 554 F. Supp. 3d 1024, 1034 (N.D. Cal. 2021).
56 See e.g. *Moehrl v. Nat'l Ass'n of Realtors*, No. 19-cv-01610 (N.D. Ill.); *Sitzer v. Nat'l Ass'n of Realtors*, No. 4:19-cv-00332-SRB (W.D. Mo.); *Nosalek v. MLS Prop. Info. Network*, No. 20-CV-12244-PBS (D. Mass.).

(PGA), alleging that the PGA Tour's regulations are anticompetitive and have harmed the careers of various professional golfers by imposing unlawful participation restrictions across tours.[57] Specifically, the golfers asserted claims under:

- Section 1 of the Sherman Act, based on the PGA Tour's alleged group boycott alongside the DP Tour (the European Tour) of LIV Golf and its players;
- Section 2 of the Sherman Act, based on the PGA Tour's unlawful maintenance of a monopsony over elite professional golf; and
- California's Cartwright Act.[58]

The plaintiffs further asserted a breach of contract claim, arguing that the PGA Tour violated its own regulations by suspending the plaintiffs and declining to stay their suspensions pending their appeal through the PGA Tour's internal disciplinary process.

Concurrent with the filing of their complaint, three of the 11 plaintiff golfers (the TRO plaintiffs) moved for a temporary restraining order (TRO) against the PGA that would've lifted their suspensions from the PGA Tour and allowed them to play in the FedEx Cup Playoffs, for which they had qualified. Only a week after the filing of the complaint and the TRO motion, the court denied the latter without prejudice to filing a motion for preliminary injunction. District Judge Beth Labson Freeman found that the TRO plaintiffs had not adequately shown irreparable harm because:

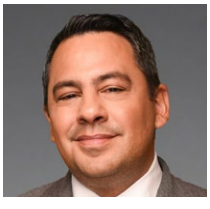
- they 'are not barred from playing professional golf against the world's top players, from earning lucrative prizes in some of golf's highest-profile events, from earning sponsorships, or from building a reputation, brand, and fan following in elite golf';[59] and
- they 'each knew, going into negotiations with LIV Golf, that they were virtually certain to be cut off from TOUR play' and, therefore, negotiated contracts that 'were based on the players' calculation of what they would be leaving behind and the amount of money they would need to compensate for those losses.' In other words, the players 'signed contracts that richly reward them for their talent and compensate for lost opportunity through' PGA Tour play; therefore, they 'have not even shown that they have been harmed – let alone irreparably.'[60]

57 *Mickelson v. PGA Tour, Inc.*, 2022 WL 3229341 (N.D. Cal. Aug. 10, 2022).
58 Cal. Bus. & Profs. C. §§ 16720(a), 16726.
59 *Mickelson*, 2022 WL 3229341, at *5.
60 *Id.* at *6.

Because the court found that the TRO plaintiffs could not show irreparable harm, it declined to reach the issue of whether they have shown likelihood of success on the merits but nevertheless provided a 'brief summary of its impressions' of the merits of the plaintiffs' claims at the early stage of the case:

- The court found that 'at this early stage of the case,' the TRO plaintiffs had failed to make the necessary showing that the facts clearly favor their success on the merits of their breach of contract claim, given the language of the PGA Tour regulations that vested power in the commissioner to suspend a member's playing privileges upon violation of the regulations.
- The court found that the TRO plaintiffs' failed to show that the facts clearly favored their success on a per se Section 1 claim that the PGA Tour and the European Tour engaged in a group boycott.
- The court found that the TRO Plaintiffs 'raise[d] significant antitrust issues that are facially appealing with respect to their Section 2 claim that the PGA Tour engaged in an unlawful maintenance of a monopoly' but noted that these were 'complex issues [that were] best resolved on a more developed record.'[61]

Finally, the court dismissed the consumers' unjust enrichment claim with leave to amend.



Michael E Martínez
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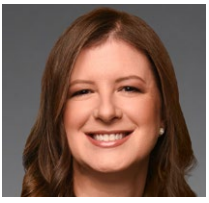
Michael Edward Martínez is the managing partner of the Chicago office of K&L Gates and is a partner in the firm's antitrust, competition and trade regulation practice group. He focuses his practice on defending global and US companies in antitrust class actions and other complex civil and criminal litigation, as well as international and US government cartel and other white-collar investigations. He is lead trial counsel in numerous multidistrict antitrust class actions and has successfully defended global corporations in International Chamber of Commerce and US-based complex arbitrations. He regularly counsels clients on distribution, supply chain, pricing and compliance issues, as well as on mergers and acquisitions.

61 *Id.* at *8.

Mr Martinez has substantial experience of seeking and defending emergency injunction matters involving unfair competition, false advertising, trade secrets, and covenants not to compete. He has successfully argued before the Seventh Circuit Court of Appeals and obtained immediate injunctive relief for clients in antitrust, franchising and intellectual property cases.

Mr Martinez has been recognized as one of America's Top 100 Bet the Company Litigators in antitrust and class action defense and as an Illinois Super Lawyer for antitrust litigation.



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Lauren Norris Donahue is a partner in K&L Gates' antitrust, competition, and trade regulation practice group. She focuses her practice on defending international and US companies, as well as individual executives, in antitrust class actions and US and international government investigations. She also regularly counsels clients on a wide variety of antitrust and competition issues.

Ms Donahue has extensive experience of representing clients in international cartel investigations and related class actions. Her cases involve price-fixing, market allocation, bid rigging, no-poach agreements, monopolization, unfair competition, and other restraints of trade. She has also conducted numerous internal investigations for major domestic and international corporations.

Since 2018, Ms Donahue has been recognized as a leading antitrust practitioner in Illinois by Chambers USA. She is regularly selected by her peers as a 'rising star' in Illinois for antitrust litigation and is recognized as an 'emerging lawyer' in the areas of antitrust law and criminal defense law: white collar by Leading Lawyers. She is also a frequent author and speaker on numerous topics relating to antitrust, government investigations, and compliance issues.

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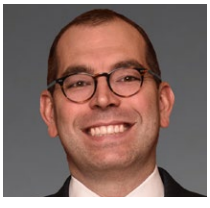
John Susoreny is a counsel with the firm's antitrust, competition, and trade regulation practice group. He focuses on complex civil litigation with a focus on antitrust, cartel, and trade regulation and has experience with antitrust disputes and investigations arising in a number of industries, including pharmaceuticals, telecommunications, paper, and food products. He has experience in counseling clients on antitrust compliance policies and has performed antitrust compliance audits to assess and improve clients' compliance with antitrust laws. He has worked on price discrimination, price-fixing, patent licensing, mergers and regulatory matters.



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Brian J Smith is an associate in K&L Gates' antitrust, competition and trade regulation practice group, based in Chicago, Illinois. He focuses his practice on complex civil and criminal litigation, government enforcement and white-collar criminal defense, particularly in the areas of cartel and competition defense. Mr Smith defends clients in federal and state courts, principally in matters involving the Department of Justice and federal antitrust class actions, against allegations of price-fixing, market and customer allocation, bid rigging, no-poach agreements, and other restraints of trade. He has extensive experience in conducting internal investigations for major domestic and international corporations in response to government federal and state government subpoenas – both criminal and civil – premised on the same conduct. Mr Smith is a frequent author on numerous topics relating to antitrust, government investigations and compliance issues.

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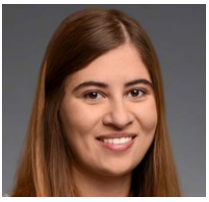

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Victoria S Pereira is an associate in K&L Gates' antitrust, competition, and trade regulation practice group. She focuses her practice on complex civil and criminal litigation, government enforcement, domestic and international internal investigations, corporate criminal defense, and antitrust counseling. Ms Pereira has experience representing clients in federal and state courts, mostly in matters involving the Department of Justice and federal antitrust class actions, against allegations of price-fixing, customer allocation, bid rigging, unfair competition, and other restraints of trade. She also has experience conducting internal investigations for domestic and international corporations across a variety of industries. Her cases often involve defending corporations and individuals who are subjects of federal and state grand jury subpoenas and enforcement proceedings. She has also represented US and international companies in antitrust class actions and multidistrict litigation.

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K&L Gates is a fully integrated global law firm with lawyers located across five continents. Our broad global platform allows us to guide clients through the legal challenges inherent in the ever-changing international landscape. The deep latticework of relationships across our offices and practices enables our clients to respond to diverse legal issues and risks through the services of one law firm with a single communication.

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