Antitrust, Vol. 32, No. 1, Fall 2017.

LITIGATION PRACTICE

Notes from the Field

Views from the Bench: Non-Merger Civil and Criminal Antitrust Cases

BY LISA C. WOOD

TRIAL LAWYERS VALUE THE OPPORTUNITY to hear from judges who preside over antitrust cases, and the ABA Section of Antitrust Law was fortunate to have 11 federal judges from around the country speak at programs presented at the 2017 Spring Meeting. In this column I share observations offered at one of these programs by three experienced trial judges—Denise Cote, Paul Friedman, and Michael Baylson—about non-merger civil and criminal antitrust cases.

Judge Denise Cote has been on the bench in the Southern District of New York for 23 years. She has handled numerous antitrust cases, including *In re Wireless Telephone Antitrust Litigation*, *Siti-Sites.com, Inc. v. Verizon Communications Inc.*, and the *United States v. Apple, Inc.* e-books case. Before that, she was a federal prosecutor in the Southern District of New York, where she was the first woman to head the criminal division, and earlier was in private practice at Kaye Scholer.[1]

Judge Paul Friedman has also been on the bench for 23 years, in the District Court of the District of Columbia. Judge Friedman handled the *Whole Foods/Wild Oats* merger case, *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Company Antitrust Litigation*, and *In re Rail Freight Fuel Surcharge Antitrust Litigation*. Before that, Judge Friedman had a varied practice in both the public and private sectors. In addition to serving as an assistant U.S. Attorney in the District of Columbia, he was an Assistant to the Solicitor General of the United States and worked on the Iran-Contra investigation. When he was in private practice, he was the managing partner of the D.C. office of White & Case.[2]

Judge Michael Baylson is from the Eastern District of Pennsylvania, and has been on the bench for 15 years. He has handled several antitrust cases, including *Shionogi Parma Inc. v. Mylan Pharmaceuticals Inc.* and the multidistrict *In re Domestic Drywall Antitrust Litigation*, among others. Before that, he served as a state and then federal prosecutor in Philadelphia, serving as the U.S. Attorney in the Eastern District of Pennsylvania from 1988 to 1993. He previously was a partner at Duane Morris and head of the trial department there.[3]

Antitrust Cases as Professional Challenges. The judges offered positive views of antitrust cases as both professional challenges and learning opportunities.

Judge Cote:

> I am thrilled to get antitrust cases or complex cases of any kind. Most of us love this job because we love the idea of a lifetime of learning, and if we're already familiar with the field, it's nice to learn about the more esoteric aspects as opposed to understanding the general framework in which the litigation is being conducted. So I think it's a benefit to the job that we get challenging, interesting cases, and I think most of us—I can't speak for everyone—are very happy to have an antitrust case among their many cases on the docket.

Judge Friedman:

> When I get an antitrust case I always say, "I'm glad it's not a patent case." But, seriously, antitrust cases are really fun and challenging and interesting. Some of what we do as judges is routine, and our job is to make sure we don't treat it like it's routine because it's so important to the lawyers. A lot of the criminal cases are not intellectually challenging, but there's nothing more important that we do as judges than to sentence people. So when we get a case from you guys with all these interesting, intellectual, hard questions and expert witnesses, I think we do relish the challenge but appreciate the help that you can give us in understanding these complex concepts.

Role of Generalist Judges. All three judges endorsed our system of generalist judges, though Judge Friedman explained that not all judges are in favor of the current system:

> There's a debate between a number of people, but in particular Judge Doug Ginsburg and Judge Diane Wood on this. They've both written and spoken on it. Doug, I think, at least in

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> the patent area, is in favor of the specialized courts and the idea of the Federal Circuit. And Judge Diane Wood, like Judge Cote and like me, thinks the generalist courts are a good thing.

Judge Friedman explained that a generalist judge's broad experience handling many of the procedural issues common to cases large and small is helpful in a complex case.

> When you think about it, in most of the cases that we have, even patent cases, antitrust cases, other complex cases, there are also all sorts of other issues that emerge that you, I would hope, would prefer to have a generalist judge resolving. Statutory construction issues, class certification issues come up in a variety of contexts. They're not antitrust specific. They come up in civil rights cases as well.

He also assured the audience that generalist judges learn how to handle a broad range of complex issues with the help of good lawyers.

> And we're pretty good, with the help of good lawyering and good lawyers, at getting on top of hard issues. Environmental cases are complicated; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Water Act and the Clean Air Act. We do that all the time.

Judge Baylson added that generalist judges are very important to preserving the unique American institution of a jury trial by ensuring that counsel present the case in a way that can be understood by jurors:

> The only other thing that I want to add to this is the concept that every case that's filed, at least theoretically, can lead to a jury trial. A jury trial is embedded in our Constitution, and as you probably know, we're the only country in the world that still has jury trials in civil cases. Juries are, of course, lay people. One danger, I think, of getting specialized judges is that you would further erode the right to a jury trial. We know that jury trials have declined tremendously, which is one unfortunate thing about the way our current judicial system is operating. We have to deal with the fact that almost all cases are settled, but some could go to a jury. I think having a generalist judge means that the lawyers have to make sure they're educating the judge, and they may at some point, if a case doesn't settle, have to educate a jury. So I think having a generalist judge is better because if, as and when you go to a jury you're going to have to deal with lay people who really probably know much less about the topic than the generalist judge did.

Role in Case Management. While acknowledging the important role lawyers play in helping judges handle complex cases, the judges also recognized the increasingly important role judges play in case management. As Judge Friedman explained:

> I think there are ways that judges, particularly in big cases, can control and manage things. A huge part of our job as judges is being case managers and running things. Lawyers don't run the courtroom. Experts don't run the courtroom. Judges have to manage the courtroom, and each of us has our own techniques, and it depends on the nature of the case. But if we don't run things and control things, then they can get out of hand.

In addition to case management orders for complex cases, Judge Friedman explained a novel approach he used for managing extensive expert opinions in a complex patent case that he thought could be employed in an antitrust case:

> In a patent case . . . there were 14 experts proffered. And I thought, *This is a little crazy. How are we going to deal with that?*
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> So I asked each side to give me, I think it was about a ten-page summary of each expert's report; who the expert was, background, what this expert is opining about, what the basis for the opinion was. I made it very clear this was not a substitute for the report itself. You were not going to be hoisted on your own petard if you left some things out of this summary. It was to give me a roadmap for the hearing I was going to have.
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> And then, in that case I said, "We're going to have 3 days of testimony, 1 hour for each expert, 25 minutes for the proponent to examine, 25 minutes for the opponent, and 10 minutes for the judge, and if I took more time it wouldn't count against any of you."
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> Then I was able to go away and have a real sense of who these people were and what they were talking about and where they fit into the case, and I could write what turned out to be a fairly lengthy opinion, and admitted some opinions and excluded others.

Judge Baylson reflected on his positive experience with phased discovery in a Section 1 antitrust case:

> In one case, I decided, and counsel went along with this, both plaintiffs and defendants, to first limit fact discovery to the issue of whether there was an agreement. . . . And there was some sparring over how the question would be phrased, but once we got through that, the discovery proceeded for about six months limited to that issue. And both sides wanted to have expert testimony, expert reports on that as well, which the Third Circuit has held is relevant on the issue of whether the parties formed an agreement.
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> Then there were summary judgment motions, and the briefing on that took another four to five months. I finally had a very lengthy oral argument and wrote a very long opinion in which I granted summary judgment to one of seven defendants because I found there was insufficient evidence that that defendant had participated in the agreement. And the defendants wanted me to certify the case for an interlocutory appeal, and I agreed to do that, but the Third Circuit refused to take it. So the case is now moving forward on the class action issue.
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> But it had several results that I thought were beneficial, and I'll just be very brief about this.
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> Number one, it eliminated one defendant from defending the rest of the case. So for that company the case was over, and of course they are free of any kind of financial responsibility for the case and free of hiring lawyers, etc.
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> Of the other defendants, three of them have since settled. That leaves three defendants that are now in the case on the class action issue. Those defendants filed *Daubert* motions as

to the plaintiffs' experts. So we're now proceeding in briefing on the class action issue, and I have now agreed to have an evidentiary hearing for the experts to actually testify in an evidentiary hearing with their reports constituting their direct testimony, and then there will be cross-examination, redirect, and recross.

So we are moving toward a decision on *Daubert* and on class certification, and we've not yet touched anything about damages. But this has generally been done by agreement with counsel as the most efficient way to move this particular case forward.

Judge Cote explained the importance of the initial conference in a court's management of a complex case because it will inform the court's assessment of proportionality.

One of the questions that's at the forefront of case management now is the issue of proportionality, and judges are encouraged to be active case managers. Now I think when Paul and I were in baby judges school together that theme was very present, you know, that we were encouraged to be active in managing our cases, both large and small. But I think it's now more formally recognized even in the Federal Rules of Civil Procedure.

If I was to give this theme one practice tip to attorneys, it is to come to the initial conference after the motion to dismiss has been decided fully informed about what discovery you need, what's important with respect to the sequencing of that, what limitations you want the judge to impose—to come in a way that you've thought both tactically and strategically about your case so that you can design, and help the judge design, a management structure for that case that is going to be helpful in that particular litigation.

I use the initial conference to learn about the case from that vantage point and also to make suggestions to counsel. I come usually with my own proposal about sequencing of discovery, trying to understand what the core discovery is, understanding most cases will settle, trying to figure out what the parties need early on to make that evaluation about settlement discussions, to understand whether, for instance, expert discovery can be conducted concurrently with fact discovery, what kinds of limitations on electronic discovery are important, how many fact depositions we actually need, all those kinds of issues.

I think that each case is its own unique animal, and I want attorneys to be thinking creatively, and I certainly try to think creatively about what will be helpful in this case to get the parties as quickly and efficiently as possible to the point where they can evaluate the case for settlement or get the core discovery they need to go all the way to trial.

Role of Magistrate Judges. The judges were not of one mind regarding the use of magistrate judges to assist with complex cases. Judge Cote explained that she rarely referred discovery disputes to magistrate judges:

I know practices vary in my own district and around the country, but I don't use magistrate judges or special masters for discovery. I've always managed discovery myself. And I think there are enormous advantages for me. There are many good ways to be a great judge, but just for me, this works. I started this as a new judge because I realized there were so many fields of practice that I didn't know anything about, and I just really wanted to get up to speed as fast as I could and understand sort of what was behind the screen in terms of what I would otherwise see as a judge.

Over time I've really enjoyed the case management aspect of being a judge. I feel that by being the one who makes the decisions on the discovery schedule, the scope of discovery, and rules on discovery disputes, I can save the parties an enormous amount of time. It's very cost effective, and it helps me, I think, be a better judge on the case.

Discovery disputes don't fester before me. If you have a discovery dispute, you have to meet and confer with your adversary. We have a local rule in the Southern District of New York that forbids motions and requires that meet-and-confer process. But if you have a dispute after that process, you write me a letter no longer than two pages, and I rule on it promptly. The adversary will or won't get a chance to respond to the letter. More often than not I'll just schedule a phone conference, give everybody a chance to be heard, and give you a ruling.

Because I don't have magistrates controlling discovery or being responsible in the first instance, people know they are not going to get a second bite at the apple. There is no appeal to a district court judge.

I also feel it's easier for me. Once I've heard the parties and given them the rulings, it's easier for them to plan their lives. They know with certainty what the lay of the land is. I think one of the things we offer our litigants and our litigators is a sense of firmness in that the case is moving forward, that it's not stuck, that it's not going to go on forever, that you know what the rules are, and you can predict the course of the litigation. Hopefully, you get a sense that this is all being done fairly and transparently. You give everybody one opportunity to be heard, you rule, and then you move on; that's my view.

Judge Baylson on the other hand relies on magistrates and special masters for complex electronic discovery issues:

Let me say that the topic of search terms has come up, and this can be a contentious issue in a lot of cases. If there is a magistrate judge in the district who has expertise in that, that can be useful. Because frankly—and this is something I tell lawyer audiences all the time—if this is an antitrust case, you need to know not only has the judge ever dealt with an antitrust case or has background in antitrust law, but you also need to know, if you're going to have discovery motions in front of the judge, what level of sophistication the judge has about electronic discovery. Because more and more district court judges have been practicing lawyers and have had some experience, whereas the older group among us has not, and that can make a big difference in the judge's ability to rule on an electronic discovery issue.

So when the issue of search terms comes up, I happen to have a former law partner of mine who also has a masters in computer science, and I have appointed her as a master limited to the issue of search terms, and that's been very effective in

moving the case forward and getting over that particular issue.

Judge Friedman fell in the middle, explaining that he handles discovery disputes in non-complex cases, but regularly relies on magistrates or special masters in complex cases:

> My practice in non-complex cases has been to do something like what [Judge Cote] does in New York, which is to say, if you've got a discovery dispute you try to work it out, and if you can't work it out, you call my chambers and we'll have a conversation that day or the next day. I don't refer those things to a magistrate judge.
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> But in complex cases I do refer it. And I mentioned the railroads case with Judge Facciola and the e-discovery experience. The *In re Vitamins Antitrust Litigation* case, which I had briefly before it went to Judge Hogan, had a huge number of parties. And I said, "What about a magistrate or a special master?" And the lawyers on both sides said, "We think this would overwhelm a magistrate. How about a special master?" I said, "Come up with three names you agree upon." They agreed upon three names, to my surprise, and I picked one and I appointed him.

Counsel's Role in Educating the Court. All three judges emphasized the important role counsel plays in educating the court in an antitrust case. Judge Cote explained:

> I think the challenge in so many cases that we deal with when we come on the bench is we rely on lawyers to educate us—your first maritime case, your first copyright case, your first patent case, your first employment discrimination case. We rely on counsel to help educate us, and we read a lot.
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> I think the major piece of advice I would have is to not assume a level of expertise or knowledge. Judges are not offended if you give us the lay of the land, sort of the big picture, and then focus more narrowly into the particular issues that will be drivers in the litigation.
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> Don't assume that the terminology is understood. Don't assume that the field of expert opinion is understood. We try to encourage all our judges, I think, to not be shy about revealing our ignorance, to ask for help. I think lawyers rise to the occasion when we say, "I've never had this kind of case or this kind of issue before. I'm going to rely on counsel to help educate me here and get me up to speed." I think lawyers enjoy that opportunity and responsibility. So I think together it's a real partnership of making sure that judges can rule intelligently and usefully in a case.
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> So I would encourage counsel to think about how to educate me, how to educate my colleagues. What cases are the most helpful in setting forth the framework? Make sure you quote them. Are there particular secondary sources that people in the field rely on as sort of the sound, well-respected view of this area that can help get a judge up to speed?
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> So I think judges shouldn't be shy in explaining what their level of knowledge is, but I think lawyers shouldn't be shy either in offering assistance to the court about things that are frequently undisputed but that can help make the judge a better educated judge on the case.

Judge Friedman encouraged lawyers to avoid a "shotgun" approach when arguing a motion:

> I've always thought as a lawyer, as an advocate, that you really ought to identify your strongest points and emphasize them, and identify your adversary's weakest points and identify them. A shotgun approach usually doesn't work very well, and it certainly muddies the waters more often than elucidates, it seems to me.

He also encouraged counsel to avoid using technical jargon or at least explain the jargon with a glossary.

Judge Baylson explained that educating the judge is very important and has a special resonance in antitrust cases. While he has found that handling discovery himself in antitrust cases has helped him understand cases better, he relies heavily on counsel when economic experts proffer reports that are very technical:

> The lawyer has an obligation to make sure the judge understands what the expert economist is saying and, even if the judge doesn't want to maybe show his or her ignorance by specifically asking about it, to really explain what the economist that the party has hired is talking about in plain language, or fitting it into a legal issue that's relevant, or a factual issue that's relevant in the case.

Judge Baylson also encourages counsel to use chronologies and charts to educate the court:

> A lot of lawyers omit having a chart of prices in an antitrust case, or price movements. It can be very helpful, even in pretrial hearings, to bring that and make that point to the judge, as well as in a jury trial.

Role with Expert Evidence. The judges also discussed their views on expert witnesses, which are an antitrust staple. Judge Cote encouraged counsel to select an expert who is not only well qualified, but who will take the time to do the necessary work:

> In terms of practice tips, you may choose your experts because they are very well known and admired in the field, and so you're looking at their resume and their reputation. But I think it is more important to have an expert who is not only well-qualified, but also who's going to do their homework.
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> And I've had Nobel laureates in my courtroom. It's quite wonderful to be a judge, I have to say. It really is a thrill. But you can be stunned by the arrogance of some folks who think that just because of their name, their reputation, their resume, that that's going to carry the day when they don't know the facts.

Judge Friedman addressed the importance of the judge's gatekeeper role when ruling on *Daubert* motions, but counseled lawyers to think through whether these motions are necessary in jury waived trials, or on pretrial matters resolved by the court.

> One of the things I've always thought, and I've written a couple of short opinions on is this: When you think about the purpose of *Daubert*, under *Daubert*, and Rule 702, we, the judges, are supposed to be the gatekeeper. That's the purpose of a *Daubert* hearing. We're supposed to be the gatekeeper so that the jury does not hear "junk science." Is it reliable, has it been

peer-reviewed, is it relevant? And very often you'll find, I'm sure in opinions of all judges on *Daubert*, sometimes you accept the credentials of the expert and you permit opinions on these three items, but exclude them on those two items. And so it's not an all-or-nothing kind of thing.

But if we are supposed to be the gatekeeper, I've always wondered, in a bench trial or in a class certification hearing where the judge is the fact finder, for whom are we keeping the gate and why do we need a *Daubert* hearing?

So when people in a bench trial say, "Let's have a *Daubert* hearing," I say, "Why? I can sort it out at the time of trial." If people in a class certification hearing want a *Daubert* hearing in advance, I say, "Why? We can do it as part of the class certification hearing."

Once you go down that road, though—and I frankly have gotten a lot of guidance from Michael's colleagues on the Third Circuit, Judge Scirica and some of the others have written a lot about this—the question of the reliability, if that's the right word, of the expert under *Daubert* may be a different analysis from reliability under Rule 23 class certification. So I think you need to address these things as separate analytically, but not separately in point of time, when you deal with them.

In a non-class certification case and when there may be a jury, you need to do it sufficiently in advance so that the lawyers know what's in and what's out and why. I suppose none of us encourage motions for reconsideration, but to Denise's point that we don't want to get it wrong, particularly in these esoteric and technical areas if we do get it wrong sufficiently in advance of trial and you want to come back on some really discrete issue, there ought to be time. And it shouldn't be done on the eve of trial because you're forced to go back to your experts then and say, "Okay, here's what the judge has ruled. You can't talk about X, Y, and Z, you can talk about A, B, and C, and let's sort of tailor your testimony." You need time to prepare for that.

Role of the Jury. The judges agreed that counsel should not be concerned about jurors having too short an attention span to understand evidence in a complex antitrust case. However, as Judges Cote and Friedman both explained, counsel should be respectful of jurors' time and present cases efficiently. Judge Cote explained:

I think that juries often come to the trial thinking, *Oh my lord, I've been chosen as a juror. I have the rest of my life that's important to me, what have I gotten into here?* And then a witness or two are on the stand and they are fully engaged. They understand the importance of what they're doing, they're thrilled, by and large, to be there and be participating. So I don't think the attention span issue is an active one in terms of their engagement in the trial process.

I think, however, that they expect technology to be used efficiently in the courtroom, and I think there's a danger of overusing technology. I think a PowerPoint presentation in your summation is not the way to go in my view. But in any event, having command of the technology, knowing that it works, testing it before the jury's hearing the testimony so you can use it efficiently to either cross-examine a witness with the excerpt from their deposition if it was videotaped or present the chart so it's on everybody's screen at the same time and the witness on the stand can circle what's important to them in a way that everybody can see it immediately. Having a fluency with technology in the courtroom is very important, and if you don't have someone on your trial team who has that fluency I think you should get them.

Judge Friedman agreed with Judge Cote:

They want us and you to be efficient once the trial starts. "No long bench conferences. Don't take long lunch hours, judge, let's move along. We'd rather sit five long days than eight abbreviated days or whatever the case may be."

Argument on Motions. The judges were not of one mind regarding the usefulness of oral argument on motions in complex cases. Judge Baylson explained that he welcomes oral argument:

I think if the lawyers in a complex case, which most antitrust cases are by definition, want oral argument, they should really make that point to the judge and identify the issues that they think need to be explained verbally, and also welcome questions from the judge. As I think my colleagues also do, I do most discovery disputes by telephone. But sometimes it's really better for everybody if there's a hearing in court with a back-and-forth. And also you may want to make a record, which some judges do by telephone but most do not. So those are all things to consider.

Judge Friedman explained that in his view oral arguments are helpful in complex cases because the court is likely to have questions:

I think having you identify the issues you want to focus on at oral argument, or sometimes, if it's a really complicated case, that I know enough about and have thought enough about, I can issue an order in advance and say, "Please focus, among other things, on the following issues." Or, "Here are the issues. We're going to have an hour for argument, here are the issues, file something telling me how much time you're going to spend on each issue and how you're going to divide up your time, if there are multiple parties, or whatever the case may be.

But I think oral argument in complicated cases and motions is really, really helpful to get the nuances and to get answers to the questions that are in my head and in my law clerks' heads.

Judge Cote explained that she, by contrast, rarely hears oral argument:

So I generally don't have oral argument except in the following circumstance, and that is if I can identify an issue, or issues, that I need counsel to address so I can better rule on the motion. And if that happens, I will either hold a phone conference or issue an order identifying the issues that I particularly wish them to address at oral argument, and of course give them freedom to talk about anything else they want to do.

I flipped my practice completely as a judge. I assumed I'd have oral argument in everything, but I would come to the bench with a draft opinion and the parties would regurgitate their briefs, and I'd read to them from my draft opinion. And I thought,

> *What is this exercise about?* And I thought, *You know, clients are having to pay attorneys to prepare for oral argument, and pay for their attendance.* So I now have it the reverse: there's a presumption there will be no oral argument—you can ask for it—unless I can identify an issue where I think it will be of help to me.

Conclusion. Judges Baylson, Cote, and Friedman offered insights and guidance that reflect both consensus and some differences in how federal district court judges manage important aspects of civil non-merger antitrust cases. The judges reminded counsel of their key role in educating generalist judges (and jurors) in a practical way about the facts of the case, the focus of expert evidence, and the antitrust standards that apply. Their comments also underscore the need for counsel to do so in a manner that both shapes and adapts to the case management procedures of the judge (and magistrate judge) presiding over their case. ■

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[1] *In re* Wireless Tel. Servs. Antitrust Litig., 385 F. Supp. 2d 403 (S.D.N.Y. 2005); United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. July 10, 2013); Siti-Sites.com, Inc. v. Verizon Commc'ns Inc., 2010 U.S. Dist. LEXIS 137557 (S.D.N.Y. Dec. 29, 2010).

[2] Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 926 F. Supp. 2d 36 (D.D.C. 2013); FTC v. Whole Foods Mkt., Inc., 502 F. Supp. 2d 1 (D.D.C. 2007); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 965 F. Supp. 2d 104 (D.D.C. 2013).

[3] *In re* Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175 (E.D. Pa. 2016); Shionogi Pharma, Inc. v. Mylan Pharms., Inc., 2011 U.S. Dist. LEXIS 146408 (D. Del. Dec. 21, 2011).