CADWALADER

Competition Close-Up | October 1, 2025

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It’s been another impactful stretch for Cadwalader’s Antitrust team—marked by thought leadership, high-profile commentary, and continued recognition. We are thrilled to share another edition of Competition Close-up.

Spotlight on Success

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We are proud to report that:

- **Philip Iovieno** and **Brian Wallach** were named to the **2026 Lawdragon 500 Leading Litigators in America**.
- **Mark Singer** was recognized in **The Best Lawyers in America 2026**.
- **Philip Iovieno** spoke with *Bloomberg Law* about the continued growth of large U.S. law firms using investment from third parties to finance the cost of litigation in an article, "**Big Law Grows Litigation Finance to Cut Risk, Please Clients**." He also shared best practices in building contingency fee practices in the *New York Law Journal* article "**Expanding Contingency Fee Practices: Best Practices**," and spoke at the **2025 Litigation Finance Dealmakers Forum**, joining the panel "The Business of Contingency: Funding, Risk, and Growth." The discussion explored how access to capital is reshaping the way firms pitch, price, and win contingency work, and offered strategies for balancing case selection, portfolio diversification, and client expectations.
- **Philip Iovieno**, **Kristen McAhren**, **Mark Singer**, and **Mason Eiss** recently authored the chapter "**Strategic Considerations for Corporate Plaintiffs in Multi-District Litigation**" in *Global Competition Review's Americas Antitrust Review 2026.*
- **Bilal Sayyed's** insights were highlighted in a recent **Law.com article** examining the FTC's continued scrutiny of executives serving on competitors' boards, and in an article on the FTC's evolving stance toward prior approval requirements in merger challenges in *The Deal* article "**FTC Stuns Antitrust Bar With Curbs on PE Acquisitions**."

Stay tuned for more updates and upcoming events from our team.

Federal Antitrust Agency Update (Summer 2025): Do the Enforcement Choices Match the "America First" Antitrust Rhetoric?

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By Bilal Sayyed
Counsel

Gail Slater, the Assistant Attorney General for the Antitrust Division, Department of Justice, suggests that the antitrust leadership of both political parties "underenforced our century-old antitrust laws for several decades," accepting "false economic theories of self-correction" of markets negatively impacted by anticompetitive conduct and dominant firms. Gail Slater, **The Conservative Roots of America First Enforcement** (Apr. 28, 2025). Federal Trade Commission Commissioner Mark Meador recently criticized "the monstrously swollen firms who've hollowed out communities, raised prices, distorted labor markets, corrupted the public square, or otherwise degraded quality across [the] economy." "Antitrust enforcement is," according to Meador, "one of the most powerful, economy-wide tools available for addressing" a "dehumanization of economic life" associated with "the size and power of the largest companies" that have "ballooned to unprecedented levels." Mark Meador, **Antitrust's Populist Soul** (Sept. 15, 2025). "Big is bad." Mark Meador, **Antitrust Policy for the Conservative** (May 1, 2025).

The first nine months of enforcement choices show some tension with these positions, as most initial enforcement actions of the President's term have substantially aligned with the practices of past Republican administrations or the enforcement priorities of the Biden Administration. This is particularly true with respect to merger matters, where the Trump Administration has rejected the previous administration's anti-merger policies and returned to the historically common practice of accepting settlements to resolve potential anticompetitive effects in large mergers. In non-merger matters, the Administration has continued the Biden Administration's efforts in several areas, including a continuing interest in developing the law on algorithmic price setting, and enforcement against interlocking directorates and employer-required non-compete agreements. Significant enforcement matters from the summer of 2025 are illustrative and are discussed below. But, the Administration's interest in removing regulatory barriers to competition, and the use of regulation by competitors to displace competition, offers an opportunity for the antitrust agencies to play a significant role in opening up markets and encouraging entry and expansion by smaller and innovative firms. These efforts – in which the FTC and Antitrust Division are playing a leading role – are just beginning. And, the Antitrust Division's aggressive use of its ability to file Statements of Interest in private litigation, without taking a position on the merits of the litigation, is a powerful tool with potential long run effects on the development of antitrust law in a manner consistent with the Administration's enforcement priorities.

A. ALGORITHMIC PRICE SETTING AND INFORMATION EXCHANGE

In August, the Department of Justice ("DOJ") settled with one of the participants in an allegedly illegal rental price-setting information exchange agreement. In August 2024, the DOJ, with co-plaintiff States, filed a civil antitrust **complaint** against **RealPage, Inc.** and in January 2025, filed an **amended complaint** adding **Greystar Management Services, LLC** (one of the largest apartment managers in the United States) and five other property-management companies as defendants. The amended complaint alleges that Greystar (and others) violated Section 1 of the Sherman Act by (1) sharing confidential, competitively sensitive information with RealPage for use in competitors' pricing, and (2) agreeing to align its pricing with competitors through RealPage's revenue-management software. Greystar licenses RealPage's AI Revenue Management product and, under its licensing agreement, provided RealPage with daily, competitively sensitive, non-public data (*e.g.*, lease renewals, terms, and prices). RealPage used this data to generate pricing recommendations for all participating landlords, including Greystar's competitors.

An August 2025 **settlement** with Greystar prohibits Greystar from licensing or using any revenue-management product that (i) employs third-party, non-public data to set prices or generate recommendations, (ii) pools information across Greystar properties owned by different owners, (iii) discloses Greystar property data to rival landlords, (iv) contains a pricing algorithm trained on competitors' non-public data, or (v) sets floor-plan limits based on competing properties' rents. **Justice Department Reached Proposed Settlement with Greystar, the Largest U.S. Landlord, to End its Participation in Algorithmic Pricing Scheme** (Aug. 8, 2025).

The Administration previously filed a Statement of Interest in private information exchange cases. In one, it opposed the defendant's proposed heightened pleading standard for Section 1 information exchange claims when the exchange was mediated by a third-party intermediary. **Statement of Interest of the United States**, *In re Granulated Sugar Antitrust Litigation* (MDL No. 24-3110, D. Mn.) (Jun. 24, 2025). In another, it noted to the district court that, contrary to

defendant's position, "there can be concerted action subject to Section 1 [through the use of an algorithm] . . . even if the conspirators have some discretion in choosing how often to follow" the algorithm's pricing recommendation and that "sharing information through an algorithm provider can create the same anticompetitive effects as a direct exchange between competitors." **Statement of Interest of the United States**, *In re Multiplan Health Insurance Provider Litigation* (MDL No. 3121, N.D. Ill.) (Mar. 27, 2025). *See also* **Statement of Interest of the United States**, *In re Pork Litigation* (No. 18-cv-01776, D. Mn.) (Oct. 1, 2024).

B. MERGERS

The Federal Trade Commission ("FTC" or the "Commission") filed for a **preliminary injunction** to enjoin **Edwards Lifesciences Corporation**'s proposed acquisition of **JenaValve Technology**'s two medical device companies, neither of which has commercialized a product in the alleged "overlapping" market for a transcatheter aortic valve replacement ("TAVR") device for the treatment of aortic regurgitation ("AR"). Nevertheless, the FTC challenged the proposed combination, alleging that it will eliminate existing head-to-head innovation and quality competition between the two firms in the market for TAVR-AR devices. **FTC Challenges Anticompetitive Medical Device Deal** (Aug. 6, 2025).

The FTC also seeks to enjoin a "partnership agreement" between **Zillow Inc.** and **Redfin Corporation** that, in exchange for a $100 million payment and future compensation, "dismantle[d] Redfin as a competitor in the market for internet listing services" and facilitated the transfer of certain of Redfin's assets – business contracts, customer relationships and personnel – to Zillow. Zillow and Redfin also agreed to serve "as an exclusive syndicator of Zillow listings" in exchange for additional compensation. The FTC **alleges** a violation of both Section 1 of the Sherman Act (an illegal agreement in restraint of trade) and of Section 7 of the Clayton Act (an anticompetitive acquisition of assets). *The partnership is vulnerable to a Section 1 claim because it does not "pool capital or resources or share risks." Also note the classification of "employees" as assets of Redfin; this may allow for the development of case law that the Commission (or DOJ) may use to challenge so-called "aqui-hire" transactions (especially in but not limited to the tech-space) as anticompetitive and subject to challenge under either or both Section 1 and Section 7.* (Commentators have suggested that the labor exemption may preclude a Section 1 or Section 7 challenge to aqui-hires. 15 U.S. Code § 17 holds that human labor is not a "commodity or article of commerce.") ***FTC Sues Zillow and Redfin Over Illegal Agreement to Suppress Rental Advertising Competition*** (Sept. 30, 2025).

The Antitrust Division accepted a **settlement** addressing its **competitive concerns** with **Hewlett Packard Enterprise**'s ("HPE") proposed $14 billion acquisition of **Juniper Networks**. Earlier this year, the Antitrust Division filed suit to block the transaction, alleging harm in the market for enterprise-grade wireless local area network ("WLAN") solutions. **Justice Department Requires Divestitures and Licensing Commitments in HPE's Acquisition of Juniper Networks** (Jun. 28, 2025). In August, the DOJ reached a **settlement** with **UnitedHealth Group, Inc**. and **Amedisys, Inc.,** in the proposed merger of two of the largest home health and hospice service providers in the country. In November 2024, the DOJ had sought to block the transaction, **alleging** that the proposed merger was "presumptively anticompetitive and illegal in hundreds of local markets across America." **Justice Department Requires Broad Divestitures to Resolve Challenge to United Health's Acquisition of Amedisys** (Aug. 7. 2025). DOJ abandoned a third matter prior to trial – the previous administration's **challenge** to **American Express Global Business Travel**'s proposed acquisition of **CWT Holdings**. The Division appears to have accepted the parties' argument that CWT Holdings was unlikely to continue to be a significant competitor in the future, absent the merger.

The Administration continues to accept settlements in lieu of litigation. The DOJ accepted a **settlement** addressing its **competitive concerns** with **Safran S.A.**'s proposed $1.8 billion acquisition of **RTX Corporation**. **Justice Department Requires Safran to Divest Assets to Proceed with Acquisition of Raytheon Assets** (Jun. 17, 2025). The FTC **settled** its **concerns** with **Alimentation Couche-Tard**'s proposed $1.57 billion acquisition of 270 retail fuel assets from **Giant Eagle** by requiring the divestiture of 35 retail fuel stations in Indiana, Ohio, and Pennsylvania. **FTC Takes Action to Prevent Anticompetitive Effects of Retail Gas Station Deal** (Jun. 26, 2025). The FTC also accepted a **settlement** to address its concerns from the proposed $13.5 billion acquisition of **Interpublic Group** by **Omnicom Group**. The Commission **alleged** that the combination of two of the six largest firms offering media buying services could lead to an increased likelihood of coordination or collusion in the market for "media buying services." To address the FTC's concerns, Omnicom is required to cease and desist from participation in any existing or future agreement or understanding with respect to media buying services that directs advertising spending based on political or ideological viewpoints of a publisher. **FTC Alters Final Consent Order in Response to Comments, Preventing Coordination in Global Advertising Merger** (Sept. 26, 2025). (The Administration's interest in preventing the censoring or moderating of viewpoint perspectives is also reflected in the DOJ's **Statement of Interest** in *Children's Health Defense, et al., v. WP Company, LLC d/b/a The Washington Post, British Broadcasting Corp., Associated Press, Reuters News & Media, Inc.* (Civ. No. 1:23-cv-2735 D.D.C.) (Jul. 11, 2025). There, according to the DOJ, the

defendants had moved to dismiss the complaint, arguing that "suppressing competition in the marketplace of ideas … is not a cognizable antitrust injury." The DOJ's filing supported the plaintiffs' contention that the Sherman Act applies to restraints on viewpoint competition in the news market.)

The antitrust agencies (*i.e.*, the FTC and the DOJ) announced the closing of two significant merger investigations. The DOJ closed its investigation of **T-Mobile**'s proposed $4.4 billion acquisition of **UScellular** after its investigation showed that "UScellular simply could not keep up with the escalating cost of capital improvements in technology required to compete vigorously" absent the merger. **Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Merger of T-Mobile and UScellular** (Jul. 10, 2025). The FTC closed its nearly one-year investigation of **Mars Inc.**'s proposed $36 billion acquisition of **Kellanova**. **Statement on the Grant of Early Termination of the FTC's Investigation of the Proposed Acquisition of Kellanova by Mars** (Jun. 25, 2025).

For more background on the antitrust agencies' theories of harm in these merger matters, the remedies accepted to clear the transactions, and other merger-related developments over the summer, *see* **U.S. Antitrust Agency Merger Enforcement Roundup and Commentary** (*Quorum*, Sept. 2025) and **U.S. Antitrust Agency Merger Roundup and Commentary** (*Quorum*, Jul. 2025).

C. INTERLOCKING DIRECTORATES

Section 8 of the Clayton Act prohibits individuals from simultaneously serving as directors or officers at two competing companies. The Biden Administration was active in investigating and remedying such interlocks. The Trump Administration is continuing this enforcement priority. In September, the FTC announced the resignation of three (unnamed) board members of Sevita Health. Each of the resigning individuals served as a director of both Sevita Health and Beacon Specialized Living Services. Both companies offer residential services for individuals with intellectual and developmental disabilities. In announcing the resignations, the FTC encouraged companies to proactively audit board memberships, particularly when private equity investors or new stockholders obtain new board seats. **Three Directors Resign from Sevita Board of Directors in Response to the FTC's Ongoing Enforcement Efforts Against Interlocking Directorates** (Sept. 15, 2025).

For more guidance on the FTC and DOJ efforts to enforce the prohibition against interlocked boards, *see* **Trump Administration Likely to Continue Biden Administration's Efforts to Identify and Remediate Interlocking Directorates** (*Competition Close-Up*, Jun. 2025); **The Biden Administration's Extensive Review of Interlocking Directorates Across the Entire Economy May Put Your Board Representation at Risk** (May 2024); and **FTC & DOJ: Board Observers Are Subject to the Antitrust Laws Prohibition on Interlocking Directorates** (Jan. 2025).

D. NON-COMPETE AGREEMENTS

The Commission has acceded to the vacatur of the Non-Compete Clause Rule (as held in *Ryan LLC v. Federal Trade Commission*, 746 F. Supp.3d. 369 (2024) and, consistent with the FTC's request, two appellate courts have dismissed the Commission's earlier challenges to decisions preventing enforcement of the Rule. Notwithstanding the Commission's dismissal of its appeals of the unfavorable decisions, FTC Chairman Andrew Ferguson indicated that the Commission will "protect American workers by . . . patrolling . . . markets for specific anticompetitive conduct that hurts American . . . workers and taking bad actors to court." **Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, Ryan LLC v. FTC**, at 3 (Sept. 5, 2025).

Consistent with this continuing interest, in September 2025, the FTC:

1. Challenged Gateway Services' use of employee non-compete agreements across its pet cremation business, **alleging** that the company's requirement that all employees (except those in California) agree to a 12-month, post-employment covenant not to compete was an unfair method of competition and prohibited by Section 5 of the FTC Act. The Commission's **proposed Order** addressing its complaint prohibits Gateway from entering into, maintaining, or enforcing (or threatening to enforce) a certain non-compete agreement and, among other things, prohibits Gateway from preventing certain employees from "soliciting current or prospective customers," except with respect to those current or prospective customers with whom the employee in the last 12 months of his or her employment, had direct contract or personally provided service.

2. Encouraged "members of the public including current and former employers restricted by noncompete agreements, and employers facing hiring difficulties due to a rival's noncompete agreements . . . to share information" with the FTC to "uproot the worst offenders and restore fairness to the American labor market." **Federal Trade Commission Issues Request for Information on Employee Noncompete Agreements** (Sept. 4, 2025). In support, the Commission released an extensive **request for information** on the use of non-

competes “to understand which specific employers continue to impose noncompete agreements.” **Request for Information Regarding Employer Noncompete Agreements** (Sept. 4, 2025). (Responses to the request are due no later than November 3, 2025.)

3. Issued **warning letters** to “several large healthcare employers and staffing firms urging them to conduct a comprehensive review of their employment agreements – including any non-competes or other restrictive agreements – to ensure they are appropriately tailored and comply with the law.” **FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies** (Sept. 10, 2025).

4. **Announced a workshop** by the FTC’s Labor Task Force (on October 8) to “highlight the negative impact of non-compete agreements on American workers and put businesses on notice of [the Commission’s] enforcement priorities.” **FTC Announces Workshop on Noncompete Agreement** (Sept. 17, 2025).

We strongly suggest that employers that use non-compete agreements review the scope and breadth of those agreements to confirm that they are consistent with applicable law, including the Commission’s interpretation of Section 5 of the FTC Act, which prohibits the use of unfair methods of competition.

See **The Federal Trade Commission “Strongly Encourage[s] All Employers . . . to Review their Contracts Closely, to Ensure That Any Restrictions on Employee Mobility are in Full Compliance with the Law**” for a more detailed discussion of the Gateway Services enforcement action and the analysis which the FTC Commissioners are applying to evaluate the legality of employee non-compete agreements.

E. CONCLUSION: THE DEREGULATORY AGENDA

To date, the enforcement decisions of the Trump Administration do not appear significantly out of step with past Republican presidential administrations of the past four decades; where they do, they appear to align with priorities of the Biden Administration. However, the Commission and the Antitrust Division have taken leading roles in the Administration’s deregulation effort.

In a matter highlighting how firms may use regulation to inhibit competition and enforce output restrictions, the Commission investigated an agreement among several truck and engine manufacturers and their trade association with the California Air Resources Board (“CARB”). The “Clean Truck Partnership” required manufacturers to produce “zero emissions” engines rather than internal combustion engines. Early in the Administration, the EPA waiver supporting CARB’s authority to promulgate the relevant regulation underpinning the partnership agreement was rescinded. The Commission was concerned that the truck manufacturers would continue to adhere to the restriction in the agreement notwithstanding rescission of the relevant waiver. The Commission closed its investigation after receiving commitments from the manufacturers that they would not attempt to enforce compliance with the agreement. According to the FTC’s Bureau of Competition, “CARB’s regulatory overreach posed a major threat to American trucking and . . . presented serious antitrust concerns.” **FTC Resolves Antitrust Concerns Arising from Clean Truck Partnership** (Aug. 12, 2025).

The Administration’s deregulatory effort – directed at removing regulatory and legal barriers to competition – appears to be an alternative to the Biden Administration’s Executive Order on Competition and *presents a significant opportunity for firms wishing to expand into new lines of business, introduce new products and services, and move more quickly in transitioning from one market to another to identify those regulations that limit, slow or forbid expansion and entry.* In August, the President **revoked** the Biden Administration Executive Order, to acclaim from the leadership of the **Antitrust Division** and **Federal Trade Commission**: “America First Antitrust focuses on empowering the American people in the free markets, not enabling regulators and bureaucrats to prescribe outcomes.” **Statement** of Assistant Attorney General Abigail Slater (Aug. 13, 2025). In September, the Federal Trade Commission, working with the Antitrust Division, recommended over 125 federal regulations for deletion or revision, in support of encouraging and facilitating competition. **FTC Recommends Anticompetitive Regulations for Deletion or Revision** (Sept. 17, 2025).

The deregulatory agenda represents a significant threat to market incumbents that rely on those regulations to limit competition. See **Federal Trade Commission Launches Public Inquiry as It Prepares to Lead President Trump’s Effort to Modify and Rescind Anticompetitive Federal Regulations** *(May 2025).*

Google Seeks *En Banc* Review in *Epic* v. *Google*: Limits of Collateral Estoppel

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Google has petitioned the Ninth Circuit for an *en banc* rehearing after the court's July 31, 2025, decision affirming a jury verdict for Epic Games. At the center of Google's request is a procedural question with broad antitrust implications: whether Epic should have been bound by the market definition adopted in its parallel litigation against Apple.

The Threshold Question: Collateral Estoppel

Google argued that Epic should have been precluded from advancing its Android-only market theory because the *Apple* court already had rejected a similar IOS-only definition. In that case, the district court defined the market broadly as "digital mobile gaming transactions" in which Apple and Google both competed. The Ninth Circuit affirmed.

Collateral estoppel is a powerful and also sometimes controversial means to streamline disputes that may arise when there are related or overlapping litigations. While there is no definitive test for preclusion, generally the issue or facts at stake must be identical in both proceedings, necessary to the case resolution, and decided after the party against whom it is applied had a full and fair opportunity to litigate the issue in the prior proceeding. It is not necessary that each of the parties or the cause of action be the same or that the cases are related. Collateral estoppel applies to facts or issues that are identical. The doctrine does not depend on whether the first decision was correct, but rather on whether the party had a full and fair opportunity to litigate the same issue. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Before trial, Google unsuccessfully moved to bind Epic to the market definition found in *Apple*, a motion that the *Google* court rejected as being brought too late and lacking merit. The Ninth Circuit affirmed. The panel emphasized that Apple's closed iOS ecosystem differs from Google's open-license Android system. This difference means that the evidence and commercial realities of Epic, Apple, and Google, as well as other competitors and consumers, were not the same. Although both cases concerned monopolization of mobile app distribution, the facts and issues were not "identical" for purposes of estoppel and indeed were not presented as such at trial. The court also noted that Google's estoppel motion was untimely, and provided an independent reason to reject it.

Moreover, the two decisions were not irreconcilable on the merits. The court drew an analogy to fast food: McDonald's and Chick-fil-A may compete in the broad "fast food" market, but only Chick-fil-A competes directly in the "chicken sandwich" submarket. Similarly, the *Apple* and *Google* cases implicated different submarkets—one closed, one open—even though they overlapped at a higher level.

Next Steps

Whether the Ninth Circuit will grant an *en banc* review remains open. Even if it does, Google faces two hurdles: *first*, convincing the court that Epic should have been bound by the *Apple* ruling; and *second*, persuading it that no reasonable jury could have found an Android-only market. Whatever the outcome, the case highlights the narrow application of collateral estoppel in antitrust litigation. Although from one perspective, issue preclusion as to prior criminal and collateral proceedings against defendants in antitrust can seem routine, courts will not assume sameness where factual and competitive contexts differ, even in closely related cases.

The Mirage within the MDL: The Unusual Journey of *Mirage Wine + Spirits*

October 1, 2025 | Issue No. 2

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Earlier this summer, an Illinois federal court dismissed the antitrust complaint in *Mirage Wine + Spirits, Inc. v. Apple, Inc. et al.* for failure to state a claim. *Mirage Wine + Spirits, Inc. v. Apple Inc.*, No. 3:23-cv-3942-DWD, 2025 U.S. Dist. LEXIS 130571 (S.D. Ill. July 9, 2025). The *Mirage* case is noteworthy, separate from the merits of its dismissal, because of the unusual path it took to get there. That path highlights the complex, and sometimes controversial, federal system of multi-district litigation ("MDL") and what some see are its statutory and practical limitations.

In 2023, Mirage brought a class-action complaint in Illinois. The complaint alleged that payment card merchants MasterCard and Visa colluded with each other and with Apple. According to Mirage, the companies agreed to give Apple a cut of the fees from Apple Pay point of sale ("POS") transactions, but only if Apple agreed not to establish its own payment network and to protect MasterCard and Visa's payment networks by blocking competitors' access to Apple Wallet. *Mirage Wine + Spirits*, 2025 U.S. Dist. LEXIS 13057.

MasterCard and Visa were separately defendants to numerous cases consolidated into *In re Payment Card Interchange Fee*, an MDL formed in New York that involved allegations of collusive overcharges paid by merchants at POS. The *Payment Card* MDL was formed in 2005 and has been active for over 20 years. At the time of the *Mirage* complaint, the *Payment Card* MDL was winding down, with the only remaining matters involving ongoing disputes regarding certification of a class settlement and an expert-related motion specific to one plaintiff.

The Judicial Panel on Multi-District Litigation ("JPML"), which is the body empowered to form MDLs and centralize related federal cases into them for purposes of efficiency, decided that *Mirage* should be consolidated into the *Payment Card* MDL for discovery and other pre-trial proceedings. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* 2024 U.S. Dist. LEXIS 120541, No. MDL No. 1720, 2024 U.S. Dist. LEXIS 120541 (J.P.M.L. June 5, 2024). The statutory requirement for consolidation is very low. Under 28 U.S.C. § 1407(a), the JPML need only find that there is but one common question of fact to effectuate a transfer. That factual question need not predominate or determine the outcome; it simply must exist. Parties are not allowed to opt out of MDL centralization but may be remanded back to their home jurisdictions for purposes of trial following MDL proceedings. *See* 28 U.S.C. § 1407(a); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S.Ct. 956 (1998).

Here, on a motion by Visa, the JPML determined that centralization of *Mirage* was appropriate because of the allegation that Visa and MasterCard had colluded with respect to POS payments. *In re Payment Card*, MDL No. 1720, ECF 534. The JPML maintained this position over objection from Mirage and defendant Apple that Mirage's POS allegations differed substantively from those in the MDL.

In the first unusual turn of events, the few remaining parties to the MDL unsuccessfully attempted to vacate the JPML's original preliminary transfer order. The interested parties argued that because the MDL Court already had completed that minimal aspect of the MDL that could be said to overlap with *Mirage*, there were no efficiencies or advantages to consolidation. The JPML was unmoved, but slipped into its transfer order the unusual language that if the MDL Court agreed there were no common proceedings to benefit *Mirage*, then the MDL Court simply could remand the case to Illinois.

Upon transfer, the MDL Court wasted no time in *sua sponte* remanding *Mirage* back to Illinois. *Mirage Wine + Spirits, Inc. v. Apple, Inc. (In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.)* 2024 U.S. Dist. LEXIS 115823, No. 24-CV-4053 (MKB), 2024 U.S. Dist. LEXIS 115823 (E.D.N.Y. July 1, 2024). The MDL statutory framework,

however, lacks a mechanism by which a court can refuse a transfer or not conduct pre-trial proceedings. In a lengthy order, the MDL Court observed, among other things, that the iPhone and Apple Pay at issue in *Mirage* had not yet even been invented when the MDL, and its differing allegations of collusion, began 20 years prior. The MDL Court declared that the MDL was essentially "over" as to *Mirage*. It then asserted its power under 28 U.S.C. § 1407 to remand for trial, under the fiction that pre-trial MDL proceedings concerning *Mirage* were complete and ready for remand.

Upon transfer, the Illinois Court dismissed the *Mirage* complaint, holding that it did not allege the same collusion previously found to state a claim in the *Payment Card* MDL. *Mirage Wine + Spirits*, 2025 U.S. Dist. LEXIS 13057.

The unusual procedural history of *Mirage*'s remand by the MDL Court is likely to remain a historical quirk and not a trend. That *sua sponte* remand and the JPML's invitation to consider that option stands in contrast to those numerous MDLs where late-consolidated actions are transferred and litigated in MDLs, despite the fact that other parties have substantially completed discovery and other common issues. In those cases, the later centralized parties are typically given the benefit of common discovery and rulings despite the absence of the prior parties.

Mirage is arguably at the outer bound of what qualifies for statutory centralization. Furthermore, the fact that centralization occurred in a 20-year-old MDL as it was winding down was certainly a factor in the JPML's decision to invite the MDL Court to determine efficiencies, and in the MDL Court's ultimate decision that there were none.

Mirage's path does, however, highlight the low statutory bar for centralization of cases by the JPML, and the high bar of overcoming the statutory presumptions of the efficiency of centralization. It moreover underscores the JPML's inherent limitations where, as here, the parties offered disputed characterizations and assertions of fact regarding the nature of the claim, disputes that the JPML is empowered neither to assess nor to adjudicate. *Mirage* should serve as a lesson to all litigants filing potentially related cases of the benefits of understanding and knowing how to litigate within the MDL system.

Editor's Note

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We're excited to share two Cadwalader updates since the last edition of our newsletter.

Phil Iovieno has been named the Co-Chair of the firm's Global Litigation Group. In this position, Phil will work with his colleagues to ensure Cadwalader continues to provide best-in-class legal services for the spectrum of disputes issues our clients navigate. He will also continue to serve as Co-Head of the firm's Antitrust Litigation practice with **Brian Wallach**.

Additionally, our colleague **Wes Misson** was recently elevated to serve as Cadwalader's Co-Managing Partner with Pat Quinn. Wes and Pat look forward to collaborating closely with Phil, Brian, practice leaders and the firm's partnership to further our commitment to deliver superior client service.