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ARTICLE

Antitrust Antidote: January-March 2026

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There were a number of decisions from January through March 2026, including: (1) the Ninth Circuit's decision in *AliveCor v. Apple*, holding that Apple's alleged refusal to continue sharing certain data with third-party app developers was properly classified as a refusal to deal (as opposed to predatory product design); (2) the FTC's win in *FTC v. Edwards Lifesciences*, a decision that provides guidance for parties considering deals involving products in development (both in terms of market definition and competitive effects); (3) the makers of David Protein bars' win in *OWN Your Hunger v. Rahal* over the lack of evidence of an effect on competition in a relevant market; (4) the decision of the Federal Circuit to vacate and remand *Global Tubing LLC v. Tenaris Coiled Tubes LLC* to the Southern District of Texas for further assessment of the facts surrounding its fraud and *Walker Process* claims; and several other decisions.

AliveCor, Inc. v. Apple Inc. **(9th Cir.)**

(refusal to deal; essential facilities)

On January 8, 2026, the Court of Appeals for the Ninth Circuit held that Apple's refusal to continue sharing certain data with third-party app developers "was properly classified as a refusal to deal." The case involved Plaintiff AliveCor's allegations that, a year after it created a software feature called "SmartRhythm" that relied on heart rate data Apple calculated through its Apple Watch, Apple adopted a Watch OS update that used a different algorithm to calculate the data and stopped sharing the old algorithm's data. According to Plaintiff, this meant it could no longer confidently detect atrial fibrillation. Apple also added its own software feature to detect irregular heart rhythms.

The lower court granted summary judgment in favor of Apple on the grounds that Apple's changes to its Watch OS improved the product and therefore constituted per se lawful product improvement under the Ninth Circuit's 2010 decision in *Allied Orthopedic v. Tyco Health Care*. The Ninth Circuit affirmed summary judgment in Apple's favor on different grounds, concluding that, even assuming Plaintiff was

correct that Apple's refusal to continue sharing the old heart rate algorithm's data with third-party app developers was distinct from Apple's improvement to its product, the conduct was properly classified as a refusal to deal. The court reasoned that, because a "'design change that improves a product by providing a new benefit to consumers does not violate Section 2 absent some associated anticompetitive conduct,'" the question is whether Apple's withholding of data was anticompetitive. The Ninth Circuit concluded that it was not because Plaintiff failed to show that Apple's conduct fell within the narrow exception(s) to the "general rule that there is no antitrust duty to deal."

Unlike other courts, which have held that the "sole" exception to the general rule requires the termination of a prior, profitable course of dealing as a necessary, but not sufficient condition, the Ninth Circuit seemed to say that there are instead two exceptions: (1) a prior, profitable course of dealing under the Supreme Court's 1985 *Aspen Skiing* decision, and (2) the essential-facilities doctrine. The second is troubling. The Supreme Court has made it clear that it will treat so-called "essential facilities" claims with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal. As Judge Douglas Ginsburg et al. have explained, there are likely "few situations, if any, in which access to a particular ... [technology] is necessary to compete in a market. Indeed, those who advocate forced sharing of an 'essential' facility often have underestimated the ability of a determined rival to compete around the facility, with resulting benefits to consumers. This is particularly true with respect to fast moving technologies, where technological and market developments can present multiple opportunities to work around a competitor's ... [technology], and it is easier to work around data than it is to work around a physical structure." And, as Nils-Peter Schepp & Achim Wambach have explained, "potential competitors do not necessarily have to build a dataset equivalent to the size of the incumbent . . . They rather need to find ways to accumulate highly relevant data to build a competitive, not necessarily the same dataset." The authors go on to observe that "[t]he origin of many innovative start-ups illustrates that companies with smaller but possibly more specialized datasets and analytical expertise may be able to challenge established companies." As Tucker & Wellford have noted, "entering the market and then collecting and analyzing user data is not a theoretical approach but rather the very model followed by many of the leading online firms when they were startups or virtual unknowns, including Google, Facebook, Yelp, Amazon, eBay, Pinterest, and Twitter."

The economic literature is at least as hostile to refusal-to-deal arguments. For example, Dennis Carlton has explained that, "[s]ince any forced participation would necessarily have to set the price terms, the courts become a type of regulatory body setting complex terms of trade and enforcing cooperation in an area where, unlike a regulatory body, the courts have no special expertise and where, if it were efficient to do so, the two firms have a private incentive to cooperate. In such a case, the only outcome to expect from court intervention is inefficiency." Moreover, imposing an enduring obligation to deal risks disincentivizing collaborations from ever taking place lest the parties be unable to adjust should they be found to be costly. Similarly,

an obligation to share the fruits of innovations on terms not privately found to be acceptable risks disincentivizing the pursuit of those innovations in the first place.

FTC v. Edwards Lifesciences Corp. (D.D.C.)

(horizontal merger involving pipeline products; *Philadelphia National Bank* 30% presumption)

On January 9, 2026, a D.C. district court granted the FTC's request for a preliminary injunction in a challenge to a proposed acquisition of medical device startup JenaValve Technology by global cardiac device manufacturer Edwards Lifesciences. The case is significant for the court's conclusion that pre-commercial products can constitute a relevant product market under the practical indicia factors set forth in the Supreme Court's 1962 *Brown Shoe* decision. The decision also makes clear that the FTC cannot rely on the Supreme Court's *Philadelphia National Bank* presumption of illegality for mergers resulting in a combined share of 30% or more when the merger involves combining overlapping pipeline products. This may be important given that the 2023 Merger Guidelines represent a greater reliance on structural presumptions. Instead, the court focused on the evidence that the parties were already actively competing and likely to continue to do so, noting that the elimination of this competition could reduce Edwards' "current incentive to accelerate the development" of its product and relax future price competition.

In a 107-page opinion, the court found that competition would be harmed in a specialized cardiac device market in which no product has yet received clearance from the U.S. Food and Drug Administration (FDA). Specifically, the court held that the proposed merger "would eliminate the vigorous competition in which Edwards and JenaValve currently engage," and reduce innovation by eliminating competition for transcatheter aortic valve replacements for aortic regurgitation (TAVR-AR) devices that are still being developed. The parties are "the only two companies in the United States with TAVR-AR devices in clinical trials," and the court noted that both devices "had been clinically validated [and] are expected to go to market in the next few years."

Pre-Commercial Products as a Relevant Market

The court analyzed market definition using the *Brown Shoe* practical indicia factors, concluding that TAVR-AR devices differed from other AR treatment options in their peculiar characteristics and uses, customers, and prices, and that the medical device industry distinguishes the TAVR-AR from other treatments. The court agreed with the FTC's economic expert Dr. Nathan Wilson (one of the authors here) that, based on testimony from physicians and Defendants' own documents, patients and physicians would not substitute another procedure or device in response to a small but significant and non-transitory increase in price, even without actual pricing data, on TAVR-AR devices, and that these treatment options should therefore be excluded from the relevant product market.

The court also relied on the Fifth Circuit's 2023 decision in *Illumina, Inc. v. FTC*, in which the court concluded that the relevant market included products in clinical trials because there was "ongoing competition to bring additional products to market." The court also noted that, "courts, economists, and the Merger Guidelines … recognize that a relevant antitrust market can include products still in clinical development."

No Presumption of Illegality for Combination of Pipeline Products

The court held that the FTC did not establish that the presumption typically holds in what it called "innovation markets," agreeing with Defendants that if the relevant product market comprises only pre-commercial products, there are no reliable market shares on which to calculate market concentration. The court went on to rule for the FTC on the grounds that it met its burden of establishing a substantial lessening of competition from the acquisition based on the merging parties' ordinary course documents and testimony from the FTC's expert Dr. Wilson, the parties' executives, and other industry participants.

In relying on the FTC's expert testimony, the court stated: "the Court agrees with the FTC's expert, Dr. Wilson, that characteristics specific to the Proposed Transaction here would decrease Edwards's incentives to innovate. … While the Court does not doubt Edwards's bona fides, the central question here is not whether Edwards would have strong incentives to develop … [its TAVR-AR device] if JenaValve were out of the picture, but rather, whether Edwards would be meaningfully incentivized to develop both [its device] … and … [JenaValve's device] if it owns the two devices. Economic theory predicts that this would not be the case. As the FTC's economic expert, Dr. Wilson, explained, 'if two firms have products that will contest with each other for sales,' a merger would reduce the combined firm's 'incentive to incur costs to develop [both] products.'"

Brandywine Hospital, LLC v. CVS Health Corp. **(E.D. Pa.)**

(single-brand market, tying)

Two hospitals (Brandywine and Reading) alleged that CVS illegally tied its provision of 340B program third-party (or "contract pharmacy") services to the hospitals' use of a CVS-owned third-party administrator. Under the 340B program, drug manufacturers are required to offer drugs to specific, statutorily enumerated providers (including certain hospitals) at steeply discounted prices. If the discounted drugs are used to fill prescriptions at a contract pharmacy that has contracted with the hospital (or other provider), the pharmacy and the prescribing hospital generally split the difference between the discounted price and the higher retail price that is charged to the patient or the patient's insurer. Hospitals typically use a third-party administrator (TPA) to manage their participation in the 340B program. The core issue in the matter is that CVS allegedly requires hospitals that use its contract pharmacy service to also use its affiliated TPA provider, Wellpartner. Plaintiffs

alleged that this requirement violated Sherman Act Sections 1 and 2 by tying CVS contracts to Wellpartner TPA services.

The district court dismissed Plaintiffs' case, rejecting Plaintiffs' proposed "CVS Contract Pharmacy market" tying market, finding that hospitals are able to contract with an unlimited number of third-party pharmacies, and that the Plaintiffs' tying market did not encompass all reasonably available substitutes. In the court's words, "Plaintiffs may choose to contract with CVS or Walgreens or any and all pharmacies they choose"; if CVS's requirement of using Wellpartner is objectionable to hospitals, they "may still contract with a different pharmacy to obtain 340B Savings from other patients" —that is, the court treated access to CVS as substitutable with access to other pharmacies. The court did not, however, analyze whether hospitals can redirect patient demand away from CVS, and thus left demand-side substitution largely unaddressed.

While the court decided the matter on narrow procedural grounds related to market definition, the factual record as described in the court's decision offers some insight into the economics of the matter. CVS currently accounts for 32.6% of the 194,016 340B program contractual relationships between hospitals and pharmacies. Patients overwhelmingly choose which pharmacy to visit on the basis of geography, with more than 70% of patients choosing a pharmacy based on location. Consequently, 340B program providers are not able to "effectively" steer customers towards a given pharmacy, and may not obtain the 340B price if a customer visits a non-contracted pharmacy. Wellpartner appears to charge above-market rates for TPA services, with a fee of $4 per prescription filled, as opposed to $0.26 and $2.50, respectively, for competitors Macro Helix and CaptureRx. Plaintiffs' core theory appears to be that CVS's tying of TPA services to 340B contract pharmacy contracts resulted in higher prices by depriving hospitals of the benefit of competition to provide TPA services.

A common limitation with tying claims like those advanced by Plaintiffs is that, as a matter of economics, whatever market power CVS has as a pharmacy is likely to be reflected in the rate it is able to negotiate with hospitals to fulfill 340B prescriptions. In short, if contracting with CVS is likely to greatly increase the rate at which a hospital's patients fulfill 340B-eligible orders, then CVS should be able to extract a relatively high share of the difference between the 340B price and the retail price, regardless of which TPA provider the hospitals use. To the extent CVS's bargaining position with hospitals is driven primarily by patient volume rather than TPA choice, CVS may be able to capture much of the available surplus through its pharmacy contracts alone, raising the question of whether the tying of TPA services increases total extraction. While CVS could, in theory, leverage its relationships with hospitals to bolster the share of Wellpartner among TPA providers, this leverage is unlikely to result in higher prices or harm to competition, given that many TPA providers remain to compete to service other pharmacies' 340B volumes.

The court's market definition analysis ended the inquiry before reaching competitive effects. But the economics suggest that CVS's bargaining power may be

driven primarily by its ability to capture patient demand, which it can monetize through its pharmacy contracts regardless of TPA choice. On that view, even if the case had proceeded beyond market definition, a fuller analysis of competitive effects may well have led to the same outcome.

OWN Your Hunger v. Rahal **(S.D.N.Y.)**

(exclusive dealing, refusal to deal, market definition)

On February 4, 2026, a New York district court granted Defendants' motion to dismiss Plaintiffs' various claims and denied Plaintiffs' motion for a preliminary injunction. The case arose out of Defendants' May 2025 acquisition of Epogee, the sole producer of a plant-based "fat alternative" known as esterified propoxylated glycerol (EPG) used in health products. Defendants are the producers of David protein bars, which use EPG as an ingredient. Plaintiffs are three producers of health products that have also utilized EPG.

The dispute centers on the fact that, leading up to Defendants' acquisition, Epogee began to back away from selling EPG to Plaintiffs. This decision was made concrete and definitive post-merger. Plaintiffs alleged that the behavior violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and New York state antitrust laws, and constituted an illegal form of exclusive dealing. Defendants' motion to dismiss followed the court's June rejection of Plaintiffs' petition for a temporary restraining order that would have prevented Defendants from using all EPG production internally.

The court found that Plaintiffs failed to make the case that Defendants' conduct constituted a harm to competition. In particular, the court noted that Plaintiffs had not identified harms within a relevant market, fatally undermining all of their different claims. In their amended complaint, for example, Plaintiffs alleged that the relevant market was the "global market for EPG supply." The court noted that it could stipulate that this was the relevant market without necessarily benefiting Plaintiffs since "Plaintiffs have failed to allege that Defendants' actions harmed competition in that market" given that Plaintiffs did not allege that EPG production would decline or otherwise change.

While Plaintiffs alleged harms to "downstream" markets, the court concluded that "Plaintiffs' failure to define the downstream product markets undermines all of their claims." For example, it was unclear to the court whether EPG-containing products should be considered distinct from other health products. Moreover, Plaintiffs did not allege whether the EPG-containing products produced by Defendants and Plaintiffs would actually ever have been seen as reasonably interchangeable alternatives for consumers.

Global Tubing LLC v. Tenaris Coiled Tubes LLC **(Fed. Cir.)**

(monopolization, *Walker Process*)

On February 26, 2026, the Court of Appeals for the Federal Circuit vacated a lower court's grant of summary judgment for Plaintiff Global Tubing on its claim that Defendant Tenaris Coiled Tubes had committed inequitable conduct in obtaining several patents. Simultaneously, the court also vacated the decision granting summary judgment in favor of Tenaris regarding Global Tubing's fraud as a mechanism for a monopolization claim. The court did not weigh in on the substance but concluded that genuine disputes of material fact precluded summary judgment in both instances, vacating and remanding the case back to the district court for further proceedings.

The case concerns a dispute over innovations in the supply of coiled tubing, a product category used primarily in oil and gas production. Tenaris had acquired the assets—including the intellectual property—of Southwestern Pipe in 2006 after Southwestern exited the market. Tenaris then sought several additional patents for its own coiled tubing products. The dispute between Global Tubing and Tenaris centers on the materiality of innovations by Tenaris relative to those of Southwestern and whether the Southwestern materials were appropriately disclosed as prior art in interactions with the U.S. Patent and Trademark Office (PTO). While some of the Southwestern materials were submitted, those showing the close relationship between Tenaris's focal product and work done by Southwestern were excluded.

Anticipating that Defendant intended to sue it over infringement, Global Tubing sued Tenaris in 2017, seeking a declaratory judgment that it was, in fact, not infringing. In the course of discovery, Global Tubing obtained documents in which Tenaris's communications regarding the Southwestern prior art and its close relationship to its own patents were revealed. Global Tubing subsequently amended its complaint to include allegations of (1) inequitable conduct; and (2) *Walker Process* fraud (i.e., that Tenaris was seeking to monopolize a market through fraudulently obtained patents).

Both Plaintiff and Defendant sought summary judgment. The district court found Tenaris's argument about the non-materiality of the Southwestern patents unconvincing given other prior art that was disclosed, and ruled for Global Tubing with respect to the inequitable conduct claim. However, the court rejected the *Walker Process* monopolization claim on the grounds that Tenaris was "such a small market player," and therefore Global Tubing could not "prove Tenaris had market power sufficient to pose a dangerous probability of achieving a monopoly."

The Federal Circuit vacated both rulings. With respect to the inequitable conduct claim, the court noted that Tenaris had proffered explanations for the non-

disclosure of the Southwestern materials and that the district court "failed to consider the evidence … in the light most favorable to Tenaris, the nonmoving party" as it was obliged to at this stage.

With respect to the monopolization claim, the Federal Circuit found that the court's decision failed as a result of a material disagreement on the facts relating to the relevant market. Plaintiff and Defendant had alleged different relevant markets, with Plaintiff focusing on a narrow, U.S.-only one, while Defendant asserted a broad, global one. "The parties' competing evidence as to the relevant product and geographic market created genuine disputes of material fact." The Federal Circuit found that the district court erred in simply asserting that because the Defendant was small, there was no dangerous probability of monopolization "without defining the relevant market, either in terms of product or geography, and without confirming the lack of a genuine dispute on these material issues." Moreover, "[t]he district court did not cite any authority, and we are aware of none, holding that an alleged attempted monopolist must hold a minimum market share in order for a Sherman Act violation to be proven." Furthermore, the district court had not taken into account the evidence suggesting that Defendant had been preparing to assert its questionable patents against Plaintiff, which could well have had the effect of diminishing competition.

Although the court did not necessarily opine on the merits, its points with respect to the monopolization claim are consistent with economists' focus on getting the counterfactual correct. It makes little sense to focus on a market structure at present if circumstances would have plausibly led to dramatic changes in that structure by the time impacts of the conduct would have been felt.

HDMI Licensing Administrator, Inc. v. Availink Inc. **(N.D. Cal.)**

(antitrust injury; tying/bundling)

Plaintiff HDMI Licensing Administrator ("HDMI LA") sued Availink for failing to pay royalties and fees associated with implementing the HDMI standard. Availink countersued, alleging that HDMI LA's licensing practices violated federal and state antitrust laws and seeking declaratory relief and cancellation of HDMI trademarks. The district court granted summary judgment to HDMI LA on the antitrust counterclaims on December 31, 2025.[1]

Availink's claims focused on HDMI LA's Adopter Agreement, which governs access to the HDMI standard and its underlying intellectual property—including patents, trade secrets, and trademark rights. Under the Agreement, adopters may obtain a blanket license to the specification and associated IP in exchange for a $10,000 annual fee and a $0.15 per-unit royalty.

[1] The case is included in this issue because it was decided on the last day of the previous quarter.

Availink alleged that the Agreement violated Section 1 of the Sherman Act by allowing HDMI LA to control access to HDMI-compliant production and to impose supracompetitive royalties. In particular, Availink challenged HDMI LA's practice of bundling IP across different versions of the standard, its failure to identify the licensed patents, and its requirement that adopters grant back certain patent rights. As evidence of anticompetitive effects, Availink emphasized that the $0.15 royalty had remained unchanged since 2002, despite the expiration of some underlying patents.

The court rejected these claims, finding no evidence of anticompetitive effects. To the contrary, the "undisputed facts" pointed to declining quality-adjusted prices, increased output, and substantial innovation. First, the nominally fixed $0.15 royalty implied a significant decline in inflation-adjusted licensing costs over time. Second, output had expanded dramatically, with nearly 14 billion HDMI-enabled devices shipped, undermining any claim of exclusion. Third, the record reflected continued innovation both within HDMI (through successive upgrades to the standard) and from competing technologies, such as DisplayPort, Thunderbolt, and USB.

The court also found Availink's theories of harm unpersuasive. The Adopter Agreement is non-exclusive and does not restrict licensees from using alternative technologies, defeating any foreclosure theory. Availink's objection to paying for a portfolio license—including patents it did not need—amounted, in the court's view, to a challenge to the level of royalties, which antitrust law is generally reluctant to police. The court further credited procompetitive justifications for the Agreement's grantback provisions, noting that they reduce hold-up risk and encourage participation in the standard-setting process. In any event, Availink had not developed relevant IP and thus could not show injury from the grantback requirement.

The case highlights a familiar tension in antitrust between static and dynamic considerations. Intellectual property rights necessarily limit competition in the short run but are intended to promote innovation over time. While Availink would benefit from lower licensing costs, compelling broader access to HDMI LA's IP could weaken incentives to invest in the development of widely adopted standards. Although antitrust scrutiny of licensing practices remains important, the court viewed the Adopter Agreement as a conventional mechanism for disseminating pooled IP in a manner consistent with innovation and competition.

***Branch Metrics, Inc. v. Google LLC*(E.D. Tex.)**

(monopolization, exclusionary conduct, antitrust standing)

On March 18, 2026, a Texas district court denied Google's motion to dismiss antitrust claims brought by Branch Metrics. Google argued that Branch lacked standing owing to the fact that Branch's product does not compete against Google products in any relevant antitrust market.

Branch's Complaint states that it has developed an Android application search technology called "Discovery" that would search content available via the applications installed on their phone, as opposed to the broader internet. Google, by contrast, is a provider of a web search engine as well as a variety of complementary technologies, including the Android operating system and the Google Play application store. Branch had defined four markets in its Complaint: the general search services market, the search advertising market, the Android app distribution market, and the Android application search services market. Google argued that Branch lacked standing in each.

While Branch's product is not a general search engine, the court ruled that Branch might nevertheless be a nascent competitor to its general search services product. To support this claim, Branch had argued that Google's withholding of revenue-sharing payments for any Android device with Discovery installed, Google's reconfiguration of its own search tools to send users to in-app content, and the alleged recognition of third-party stakeholders that, were it not for Google's conduct, Discovery would have competed directly with Google Search, showing that it was at least a nascent competitor. The court ruled that these allegations—if taken as true—represented a sufficient basis to provide Branch with standing to pursue its monopolization claim in a general search services market.

For the search advertising market, Google had claimed that Branch lacked standing in a broad search advertising market, as Google lacks monopoly power in such a market. Furthermore, Google asserted that Branch would lack standing in a narrow search text market because Branch does not supply a general-purpose search engine, a prerequisite for participation in such a market. Branch argued in return that its claims do not rely on Google having monopoly power. Instead, it focused on the allegedly anticompetitive impact of Google's agreements on Branch's availability. Moreover, Branch asserted it is at least a nascent competitor in search services, and that other market participants would have adopted it but for Google's conduct. Accordingly, as with the general search services market, the court found Branch had properly alleged antitrust standing.

The arguments against and for Branch's standing in the Android app distribution and Android application search markets followed the same pattern. And, ultimately, the court came to similar conclusions, finding that Branch's focus on its status as a nascent challenger to Google's various products provides it with

antitrust standing. While the court rejected Google's motion to dismiss, it was also clear in saying that whether or not the facts of the matter support Branch's claims about Google's conduct remains to be seen.

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